TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19[illegible]

No. 761. 164

SPERRY OIL & GAS COMPANY AND OKLAHOMA PRODUCING & REFINING CORPORATION OF AMERICA, APPELLANTS,

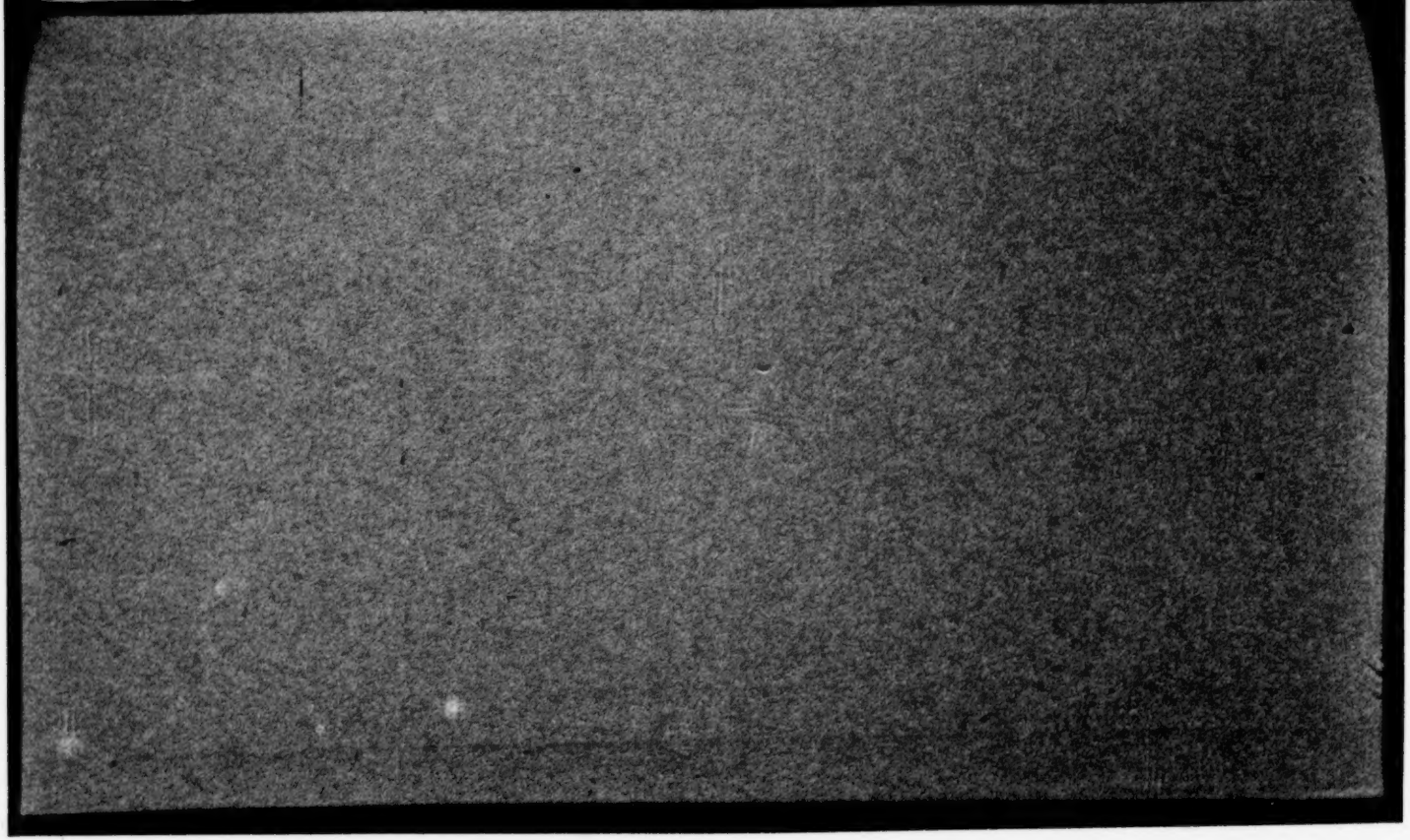
vs.

PEARL CHISHOLM AND WEBSTER CHISHOLM.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED [illegible], 19[illegible]

(22,261)



(29,281)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 731.

SPERRY OIL & GAS COMPANY AND OKLAHOMA PRODUCING & REFINING CORPORATION OF AMERICA, APPELLANTS,

vs.

PEARL CHISHOLM AND WEBSTER CHISHOLM.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption in U. S. circuit court of appeals	a	1
Caption in U. S. district court for the eastern district of Oklahoma	1	1
Record from the district court for Tulsa County	2	2
Petition	2	2
Petition for removal	7	6
Bond for removal	9	9
Order of removal	11	10
Separate answer of Sperry Oil & Gas Co	11	11
Separate answer of Oklahoma Producing and Refining Corporation of America	15	14
Reply to separate answer of Oklahoma Producing and Refining Corporation of America	20	19
Substitute opinion, Williams, J	20	20
Journal entry of judgment	28	26
Statement of evidence	33	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1922.

	Original.	Print.
Testimony of Pearl Chisholm	33	31
Colloquy between court and counsel	39	37
Offers in evidence	41	38
Defendants' Exhibit 1—Lease of Webster Chisholm to Creek and Indiana Development Co., May 14, 1904	42	39
Defendants' Exhibit 2—Stipulation modifying terms of oil and gas mining lease, February 17, 1915	48	45
Exhibit A—Blank form of lease	50	47
Defendants' Exhibit 3—Plat of Webster Chisholm farm.	54½	51
Extracts from regulation of Interior Department	55	51
Order settling statement of evidence	112	102
Assignment of errors	113	102
Præcipe for transcript	114	104
Petition for and order enlarging time	116	105
Clerk's certificate	118	107
Argument and submission	119	107
Opinion, Carland, J	120	108
Decree	129	115
Petition for rehearing	130	116
Order denying petition	144	124
Motion for stay of mandate	144	124
Order staying mandate	146	126
Petition for appeal	146	126
Assignment of errors	147	127
Præcipe for transcript and consent to granting of supersedeas	150	128
Order allowing appeal and fixing bond	153	130
Bond on appeal	154	131
Citation and service	156	132
Clerk's certificate	157	132

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1922, f said Court, before the Honorable John E. Carland and the Honorble William S. Kenyon, Circuit Judges, and Honorable Tillman D. ohnson, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the eighteenth day of January, A. D. 1922, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Sperry Oil & Gas Company, et al., were Appellants, and Pearl Chisholm, et al., were Appellees, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of an Act of Congress approved February 13, 1911, is in the words and figures following, to-wit:

1 In the United States District Court for the Eastern District of Oklahoma.

Pleas and proceedings before the Honorable R. L. Williams, Judge of the District Court of the United States for the Eastern District of Oklahoma, presiding in the following entitled cause:

In Equity.

No. 2596.

PEARL CHISHOLM and WEBSTER CHISHOLM, Plaintiffs,

vs.

CREEK AND INDIANA DEVELOPMENT COMPANY, a Corporation; Sperry Oil & Gas Company, a Corporation, and Oklahoma Producing and Refining Corporation of America, a Corporation, Defendants.

SPERRY OIL & GAS COMPANY *and* OKLAHOMA PRODUCING AND REFINING CORPORATION OF AMERICA, Appellants,

vs.

PEARL CHISHOLM and WEBSTER CHISHOLM, Appellees.

Be it remembered that this suit was begun in the District Court of Tulsa County, State of Oklahoma, and came to the United States District Court for the Eastern District of Oklahoma upon Petition,

Bond and Order of Removal; the transcript being filed in the office of the Clerk of said court on the 8th day of October, 1919, and was given No. 2596. So much of the transcript as requested by counsel herein being as follows:

2 In the District Court, Tulsa County, Oklahoma.

Civil. No. 9722.

PEARL CHISHOLM and WEBSTER CHISHOLM, Plaintiffs,

vs.

CREEK AND INDIANA DEVELOPMENT COMPANY, a Corporation; Sperry Oil & Gas Company, a Corporation, and Oklahoma Producing and Refining Corporation of America, a Corporation, Defendants.

Petition.

Comes now, Pearl Chisholm and Webster Chisholm, and for their cause of action against the said defendants, Creek and Indiana Development Company, a Corporation; Sperry Oil & Gas Company, a Corporation; and Oklahoma Producing and Refining Corporation of America, a Corporation, would respectfully show to the court:

I.

That plaintiff, Webster Chisholm, is a duly enrolled and approved citizen of the Cherokee Tribe or Nation of Indians, and is so enrolled upon the final and approved rolls of said Tribe or Nation of Indians, opposite Number 30,871, Census Card No. 10,381, and that he is a one-half degree Cherokee Indian; that as such citizen he was allotted and deeded as his proportional share of the tribal lands, two parcels of land, one being his "homestead" and the other his "surplus" allotment, his "homestead" being described as follows, viz:

Southeast Quarter of Southwest Quarter of Southeast Quarter; and West Half of Southwest Quarter of Southeast Quarter of Section Thirteen (13), Township Twenty-one (21) North, and Range Twelve (12) East, situs in Tulsa County, Oklahoma,

a copy of which said "homestead" patent or deed is hereto attached, marked exhibit "A," hereby referred to and made a part of this petition, and which said "surplus" parcel of land is described as follows, viz:

Southeast Quarter of Southeast Quarter and Northeast Quarter of Southwest Quarter of Southeast Quarter of Section Thirteen (13), Township Twenty-one (21) North, and Range Twelve (12) East, situs in Tulsa County, Oklahoma,

a copy of which said Cherokee Nation deed to said "surplus" allotment is hereto attached, marked Exhibit "B," hereby referred to and made a part of this petition.

Plaintiffs would further show to the court, that the plaintiff, Webster Chisholm, is now the owner of the aforesaid real
3 estate, and has been subsequent to the conveyance to him as aforesaid. That the plaintiff Pearl Chisholm and the plaintiff Webster Chisholm were duly and legally married on the 11th day of November, 1911, and that upon the — day of April, 1912, they moved upon and have subsequent to the last aforesaid date occupied the afore-described eighty acres of lands as their family homestead, and which occupation of said lands as a homestead has been continuous and they are now occupying the same as such homestead.

II.

Plaintiffs would further show to the court, that upon the 14th day of May, 19-4, the plaintiff, Webster Chisholm, whilst a single person, made and executed an oil and gas mining lease upon departmental form, in favor of the defendant, Creek and Indiana Development Company, a Corporation, covering the aforesaid eighty acres of real estate, and which lease was duly approved by the Secretary of the Interior, May 4, 1905, a copy of which said oil and gas mining lease with all indorsements thereon is hereto attached, marked Exhibit "C," hereby referred to and made a part of this petition.

That pursuant to said lease said lessee entered upon said premises, and explored and prospected for oil and gas, and discovered oil, and drilled nine wells thereon which produced oil in paying quantities, which said development began on or about — day of ——, 19—, and ceased on or about — day of ——, 19—, and that subsequent to said times said wells have been producing oil and gas in paying quantities. Plaintiffs would further show to the court, that upon the 14th day of May, 1914, all rights, benefits and privileges that the said defendant, Creek and Indiana Development Company, by virtue of said lease, held, expired and terminated, and that on the 9th day of March, 1914, the said plaintiff, Webster Chisholm, was induced to sign and did execute a certain further oil and gas mining lease upon said eighty acres of lands in favor of the said Creek and Indiana Development Company, a corporation, a copy of which said lease is hereto attached, marked Exhibit "D", hereby referred to and made a part of this petition.

Plaintiffs would further show to the court, that on the 18th day of July, 1914, the said Creek and Indiana Development Company, attempted to assign all its rights, benefits and privileges by virtue of the aforesaid lease, to the defendant, Sperry Oil & Gas Company, a copy of which said pretended assignment of lease is hereto attached, marked Exhibit "E," hereby referred to and made a part of this petition.

4 Plaintiffs would further show to the court, that on the 25th day of November, 1918, the defendant Sperry Oil & Gas Company, attempted to assign all its rights, privileges and benefits by virtue of the aforesaid assignment, in and to the aforesaid lease and lands to the defendant, Oklahoma Producing and Refining Corporation of America, a copy of which said pretended assignment is hereto

attached, marked Exhibit "F," hereby referred to and [ ] a part of this petition.

Plaintiffs would further show to the court, that the instrument or oil and gas mining lease executed to defendant Creek and Indiana Development Company, dated March 9, 1914, hereinabove referred to as Exhibit "D," by the plaintiff Webster Chisholm, is null, nugatory and void and of no effect, for the reason that the plaintiff, Pearl Chisholm, wife of the said Webster Chisholm, did not join therein, and did not give her consent thereto, and that the plaintiffs were at said time in open and notorious possession thereof, and occupying said lands as a homestead, and occupied the same prior to that time, and all times subsequent to April, 1912, the said land constituted their homestead, under the statute laws and Constitution of the State of Oklahoma; that the assignment of said lease by said lessee to the defendant Sperry Oil & Gas Company, and the assignment by said Sperry Oil & Gas Company to the defendant Oklahoma Producing and Refining Corporation of America, are likewise null, nugatory and void and of no effect, for the reasons above set out, and that the lease aforesaid, and the assignments thereof, each appear upon their face to be regular, and purport to convey an interest in the lands in controversy to the defendants, and cloud the title of plaintiffs' homestead lands, and will continue to do so so long as they remain of record and not cancelled, and for the recording of each thereof reference is made to said exhibits.

III.

Plaintiffs would further show to the court that the said defendants claim and assert title to an interest in the aforesaid lands by virtue of the foregoing instruments, and have subsequent to May 14, 1914, been in the limited possession thereof for the purpose of operating the same for oil and gas purposes, and have extracted and taken from said lands valuable oils, which said extraction was in violation of the rights of the plaintiffs, and that said defendants claim and assert title to said premises by virtue of said instruments adverse to the plaintiffs.

Plaintiffs further allege that said defendants, and neither of them, nor any person claiming by, through or under them, has or have any right, title, interest, equity or estate in said premises, or any part thereof, of any nature of kind, and that the plaintiffs are entitled to the full and complete possession of said premises, to the exclusion of the defendants, and that the defendants are wrongfully and unlawfully withholding possession of said premises for the purposes above mentioned.

Plaintiffs would further show to the court, that said defendants have wrongfully and unlawfully taken and extracted from said premises subsequent to May 14, 1914, oil and gas valued in the sum of seventy-five thousand dollars, and have damaged the plaintiffs in said sum by reason of their wrongful trespass and possession of said lands for the above purposes.

IV.

Plaintiffs would further show to the court, that the plaintiff, Pearl Chisholm, has never at any time since their occupancy of the aforesaid real estate as their family homestead relinquished her homestead rights therein, and that she has not received knowingly any benefits by virtue of the oil and gas leases and assignments hereinbefore mentioned, but that subsequent to the plaintiffs' occupancy of said lands as a homestead, she has, with her said husband, remained in the possession of the same and maintained their home thereon, and said lands were, during all the times complained of herein, subsequent to their occupation thereof, their statutory and constitutional homestead.

V.

Plaintiffs would further show to the court, that the defendant, Oklahoma Producing and Refining Corporation of America, is at this time operating unlawfully the aforesaid lands and extracting oil and gas therefrom, and will continue so to do until restrained therefrom or evicted from said premises, and that the plaintiffs have no adequate remedy at law, and that it is therefore necessary that a receiver be appointed to take charge of, and operate the aforesaid lands for oil and gas purposes, and accounting for the proceeds therefrom as the court shall order.

Wherefore, plaintiffs pray judgment of this court, decreeing the plaintiff, Webster Chisholm, to be the owner in fee simple title of the aforesaid real estate, and decreeing the plaintiffs the possession thereof, full and complete, to the exclusion of the defendants, and each of them, and all persons claiming by, through or under them, and their agents, employees and representatives and decreeing the aforementioned leases and assignments void, null and of no
6 effect, for reasons hereinbefore set out, and cancelling and holding for naught, each and all thereof, and purging the records thereof, and decreeing that the defendants and each of them, and all persons claiming by, through or under them, be forever barred, restrained and prohibited from settling up, or asserting any right, title, interest, equity or estate, of any nature, to the aforesaid lands, or any part thereof, and for judgment against the said defendants for the sum of seventy-five thousand dollars ($75,000.00), together with interest thereon at the rate of six per centum per annum from this date, and for the appointment of a receiver to take charge of said lands and operate the same for oil and gas, rendering a true and accurate account of the products therefrom, under proper orders of this court, and for such other and further relief as the court shall deem the plaintiffs entitled under the premises.

Respectfully submitted,

WEBSTER CHISHOLM,
PEARL CHISHOLM,
(Sgd.) By S. R. LEWIS,
LANGLEY & LANGLEY,
Attys. for Plaintiffs.

H. V. L.

STATE OF OKLAHOMA,
Tulsa County, ss:

Pearl Chisholm and Webster Chisholm, each being first duly sworn, upon their oaths, state; that they are the plaintiffs within named that they have read the within and foregoing petition, know the contents thereof, and that the allegations herein set forth, are true, accurate and correct.

(Signed) WEBSTER CHISHOLM.
(Signed) PEARL CHISHOLM.

Subscribed and sworn to before me this 2nd day of August, 1919.

(Signed) JOE HARSHBARGER, [SEAL.]
Notary Public.

My commission expires Aug. 12, 1922.

(The foregoing petition is indorsed:) District Court State of Oklahoma, County of Tulsa. Filed Aug. 4th, 1919. John D. Porter, Court Clerk.

Attorneys' lien claimed per contract dated Aug. 2, 1919.

(Sgd.) S. R. LEWIS,
LANGLEY & LANGLEY,
By H. N. L., Pryor, Okla.

7 STATE OF OKLAHOMA,
County of Tulsa:

In the District Court.

No. 9722.

PEARL CHISHOLM and WEBSTER CHISHOLM, Plaintiffs,

vs.

CREEK AND INDIANA DEVELOPMENT COMPANY, a Corporation; Sperry Oil & Gas Company, a Corporation, and Oklahoma Producing and Refining Corporation of America, a Corporation, Defendants.

Petition for Removal.

Now comes the Sperry Oil and Gas Company, a corporation, named above as one of the defendants in the above entitled action, service upon whom of the summons in which was duly made and accepted, and alleges, by way of this, its petition for the removal of the above entitled cause to the United States District Court for the Eastern District of Oklahoma.

I.

That prior to the commencement of this action, ever since, and during all of the times herein mentioned, it was and now is a corporation created, organized and existing under and by virtue of and pursuant to and in accordance with the laws of the State of Oklahoma, with its principal office in the city of Tulsa, in that state, and that as such it was and has been engaged in business, generally, in the petroleum industry in the said State of Oklahoma and elsewhere, under, pursuant to and in conformity with the laws of that state, and those of the other states of the Union in which it was and has been so engaged in business, and that of its two co-defendants hereinabove named, the Creek and Indiana Development Company is and was a corporation duly created, organized and existing under and by virtue of the laws of the State of Arizona with its principal office and place of business in the city of Phoenix in that state, of which it is and was thus a resident citizen at the time of the commencement of the above entitled action, and that the Oklahoma Producing and Refining Corporation of America above named is and was a corporation duly created, organized and existing under the laws of the State of Maryland, with its principal offices in the City of Baltimore in that state, and thus a resident citizen thereof, and that the plaintiffs hereinabove named, Pearl Chisholm and Webster Chisholm, resided in the said State of Oklahoma and in the said Eastern District thereof.

II.

That the above entitled action is of a civil nature and was originally brought by them, the said Pearl Chisholm and Webster Chisholm, in the above entitled court, jointly, as plaintiffs, to quiet the title to the premises described and referred to in the petition
8 herein in the said Webster Chisholm as the owner thereof in fee simple absolute, and to have cancelled, voided and held for naught certain of the instruments attached to said petition herein as exhibits thereto, commonly known and described as oil and gas leases and assignments thereof, and that the lands aforesaid exceed in value the sum of amount of Three Thousand ($3,000.00) Dollars, as do the leasehold interests created by the instruments aforesaid, and that the sum and amount in controversy in the above entitled action is thus in excess of the said sum and amount of Three Thousand ($3,000.00) Dollars over and above any items of interest or costs herein involved.

III.

That the claims of title of each and both of the plaintiffs hereinabove named, Webster Chisholm and Pearl Chisholm, to the premises aforesaid, and upon which their right of action herein is by them based and claimed to be established, arise out of his citizenship in the Cherokee Nation or tribe of Indians and the allotment to

him, as an enrolled Cherokee, of the premises aforesaid, which are entirely situate in the Eastern District of Oklahoma, as the surplus and homestead to which he thus became entitled under certain Acts of Congress, and that the controversies herein thereover thus present federal questions for the determination of the court on the face of the pleadings herein, in that the claims of right, title and interest by the said plaintiffs herein, Pearl Chisholm and Webster Chisholm above named, and each and both of them, and upon which each and both of them herein rely, whether they are jointly or separately considered, arise out of and will necessitate and require for their correct decision that a construction favorable to them be placed upon the Acts of Congress aforesaid relating to the disposition of the lands of the Cherokee Nation contrary to hitherto accepted federal departmental interpretation thereof and the course of federal administrative action thereunder, and of the terms of the treaties heretofore made and entered into between that tribe of Indians and the United States.

IV.

That offered and submitted herewith is a good and sufficient bond, as is required by the statute in such cases made and provided, conditioned that this petitioner, the Sperry Oil and Gas Company, will, within the time provided by law, file a transcript or certified copy of the records of the above entitled court herein in the said United States District Court in and for the Eastern District of Oklahoma, and pay, or cause to be paid, any and all costs that may be
9 awarded by that court if it shall be held that the above entitled action was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays for the entry of an appropriate order for the removal of the above entitled cause to the said United States District Court in and for the Eastern District of Oklahoma, and that the above entitled court proceed no further herein than to make such an order of removal and accept and approve the bond so presented herewith, directing that a certified copy and transcript of the record herein be made for immediate transmission by the clerk of the above entitled court to the said United States District Court in and for the Eastern District of Oklahoma, all as required and provided by law and as it is in duty bound to do, and your petitioner will ever so pray.

(Signed) R. W. KELLOUGH AND.
(Signed) FRANKLIN H. GRIGGS.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Before me, a notary public, this 6th day of September, 1919, personally appeared Ralph E. Williamson, who upon oath says: That he is assistant treasurer of the Sperry Oil and Gas Company, one of the defendants and the foregoing petitioner in the above entitled action, and that as such, he has read and knows the contents of its

foregoing petition for removal, and that the facts therein stated are true of his own knowledge.

(Signed) R. E. WILLIAMSON.

Subscribed and sworn to before me this 6th day of Sept., 1919.

(Sgd.) LILLIAM M. EDWARDS, [SEAL.]
Notary Public.

My commission expires —— —, ——.

(Endorsed:) District Court, State of Oklahoma, County of Tulsa. Filed Sept. 8, 1919. Jno. D. Porter, County Clerk.

STATE OF OKLAHOMA,
County of Tulsa:

In the District Court.

No. 9722.

PEARL CHISHOLM and WEBSTER CHISHOLM, Plaintiffs,

vs.

CREEK AND INDIANA DEVELOPMENT COMPANY, a Corporation; Sperry Oil & Gas Company, a Corporation, and Oklahoma Producing and Refining Corporation of America, a Corporation, Defendants.

Bond for Removal.

Know all men by these presents:

That we, Sperry Oil & Gas Company, a corporation, of Tulsa, Oklahoma, as principal, and the United States Fidelity and Guaranty Company, of Baltimore, as surety, are held and firmly bound
10 unto Pearl Chisholm and Webster Chisholm, as plaintiffs herein, and to the other parties of record in the above entitled action in the sum of Five Hundred ($500.00) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we, and each of us, bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that:

Whereas, the said Sperry Oil & Gas Company has filed its petition in the above entitled court for the removal of the above entitled cause, now therein pending, to the United States District Court for the Eastern District of Oklahoma, for further proceedings, on the ground in its said petition set forth;

Now, Therefore, if the said Sperry Oil & Gas Company shall, within the time provided by law, enter and file a transcript or certified copy of the records of the above entitled court herein in the United States District Court for the Eastern District of Oklahoma, and shall pay, or cause to be paid, all costs that may be awarded by

the court if it shall be held that the above entitled action was wrongfully and improperly removed thereto, and shall also appear in said District Court and enter special bail in such suit if special bail was originally requisite therein, and shall do such other appropriate acts as by the Act of Congress in that behalf are required to be done and upon the removal of such suit from said state court unto the said United States District Court, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof, these presents are executed this 6th day of September, 1919.

[SEAL.] SPERRY OIL & GAS COMPANY,
(Signed) By R. E. WILLIAMSON,
Ass't Treasurer.

Attest:
—— ——,
Secretary.

[SEAL.] UNITED STATES FIDELITY & GUARANTY CO.,
(Signed) By W. F. STAHL,
Attorney-in-fact.

Attest:
—— ——.

The foregoing bond is hereby approved this 8th day of September, 1919.

JOHN D. PORTER,
Clerk of the District Court.

(Endorsed:) District Court, State of Oklahoma, County of Tulsa. Filed Sept. 8, 1919, John D. Porter, Court Clerk.

11 STATE OF OKLAHOMA,
County of Tulsa:

In the District Court.

No. 9722.

PEARL CHISHOLM and WEBSTER CHISHOLM, Plaintiffs,

vs.

CREEK AND INDIANA DEVELOPMENT COMPANY, a Corporation; Sperry Oil & Gas Company, a Corporation, and Oklahoma Producing and Refining Corporation of America, a Corporation, Defendants.

Order of Removal.

This matter having come on to be heard upon the petition of Sperry Oil & Gas Company for an order transferring and removing the above entitled cause to the United States District Court for the

Eastern District of Oklahoma, and it having been made to appear that the said petition of the said Sperry Oil & Gas Company is in due form and that it has duly filed its bond for such removal and transfer, and that it is accordingly entitled to the said removal and transfer of the above entitled cause;

Now, Therefore, it is herein and hereby ordered and adjudged that the above entitled action be and it is hereby moved to the said United States District Court for the Eastern District of Oklahoma, and the clerk of this court is hereby directed to make a transcript of the record thereof in the above entitled court for certification and transmission to the said District Court of the United States for the Eastern District of Oklahoma, forthwith.

Done in open court this 8th day of September, 1919.

(Signed) OWEN OWEN,
Judge of District Court.

(Endorsed:) District Court, State of Oklahoma, County of Tulsa. Filed Sep. 8, 1919. Jno. D. Porter, Court Clerk.

Filed Oct. 8, 1919.
R. P. HARRISON,
Clerk U. S. District Court.

UNITED STATES OF AMERICA:

In the District Court for the Eastern District of Oklahoma.

In Equity.

No. 2596.

PEARL CHISHOLM and WEBSTER CHISHOLM, Plaintiffs,

vs.

CREEK AND INDIANA DEVELOPMENT COMPANY, a Corporation; Sperry Oil & Gas Company, a Corporation, and Oklahoma Producing & Refining Corporation of America, a Corporation, Defendants.

Separate Answer of Sperry Oil & Gas Company.

12 Now comes the defendant, the Sperry Oil & Gas Company above named, and for its separate answer to the petition of the plaintiffs herein:

I.

Admits and alleges that the plaintiff Webster Chisholm above named is a duly enrolled citizen of the Cherokee Nation of one-half blood, and that he is and was so enrolled opposite No. 30871 on the final and approved rolls of that tribe or nation on file and of record with the Superintendent of the Five Civilized Tribes, and that as

such he was allotted and had deeded to him in two parcels his proportionate share of the tribal lands, one as a homestead allotment and the other as his surplus allotment, his patents or deeds to each of which are attached by correct copies to the said petition herein as Exhibits "A" and "B" thereof, respectively, and that he is thus now, and ever since the delivery of the deed and patents aforesaid to him has been, the owner of the lands and premises therein described by whatever title is or was ever contemplated, prescribed, designated, defined or determined by the treaties made by the United States with the said Cherokee tribe or nation of Indians and the various Acts of Congress controlling thereof and relating thereto.

II.

Admits and alleges that on or about the 14th day of May, 1904, he, the said plaintiff herein, Webster Chisholm above named, made, executed and delivered a certain oil and gas mining lease to one of its co-defendants herein, the Creek & Idiana Development Company above named, covering the premises so deeded and allotted to him, which was thereafter duly approved by the Secretary of the Interior on or about the 14th day of May, 1905, and of which a true and correct copy, with all of the endorsements thereon, is attached to and made a part of the said petition herein as Exhibit "C" thereof, and that thereafter on or about the 9th day of March, 1914, he, the said plaintiff herein, Webster Chisholm above named, and it, the said Creek and Indiana Development Company, entered into a further agreement, supplemental to the lease aforesaid, which was likewise duly approved on or about the 3rd day of June, 1914, and a true and correct copy which is also attached to the said petition herein and made a part thereof as Exhibit "D."

III.

Admits and alleges that on or about the 18th day of July, 1914, all of the right, title and interest of the said Creek and Indiana Development Company in, under and to the oil and gas mining lease
13 aforesaid and the leasehold interest or estate created thereby, and in, to or under the said agreement supplemental thereto, was by it duly assigned, transferred, set over and conveyed by it to this defendant by an instrument in writing of which a true and correct copy is also attached to the said petition herein and made a part thereof as Exhibit "E," and that thereafter, and on or about the 25th day of November, 1918, this answering defendant itself, in turn, sold, transferred, set over, and assigned and conveyed all of its then right, title and interest in and to the oil and gas mining lease aforesaid, and the said agreement supplemental thereto, and in and to the leasehold interest and estate therein and thereby created, to its other co-defendant herein, the Oklahoma Producing & Refining Corporation of America above named, by an appropriate instrument in writing of which a true and correct copy is also attached to the said petition herein and made a part thereof as Exhibit "F,"

and that both of the said assignments were duly approved by the Secretary of the Interior, the one on the 20th day of August, 1914, and the other on the 20th day of May, 1919.

IV.

Admits and alleges that at the time of its acquisition of the oil and gas mining lease aforesaid and the leasehold interest or estate therein and thereby created, by assignment and transfer as aforesaid from its said co-defendant herein, the Creek and Indiana Development Company above named, the land and premises covered thereby were in the course of development for oil and gas in accordance with the terms and provisions of the lease aforesaid, and that during the period of its ownership and possession thereof and thereunder the said work of development was further continued, also in accordance with and pursuant to and as contemplated by the lease aforesaid, and that to the best of its knowledge, information and belief its said further development has been continuous at the hands of its other said co-defendant herein, the Oklahoma Producing & Refining Corporation of America.

V.

Admits and alleges that the defendants herein, Webster Chisholm and Pearl Chisholm, his wife, are in possession of and resident upon certain portions of the lands and tracts referred to and that they were so resident and in possession during all of the time of this answering defendant's ownership and possession of and under and pursuant to the term and provision of the oil and gas mining lease aforesaid, and the said agreement supplemental thereto, as assigned to it as aforesaid, and that they were thus at all times fully advised and wholly cognizant of whatever was done or undertaken by
14 this answering defendant in the premises, and that it has at all times kept, done and performed all of the matters and things of it required to be kept, done and performed in, under and by the terms of the oil and gas mining lease aforesaid and the said agreement supplemental thereto, as so assigned to it as aforesaid, and that they, the said plaintiffs herein, Webster Chisholm and Pearl Chisholm above named, in all respects with full and complete knowledge thereof, voluntarily received, accepted and have ever retained the benefits to which they became entitled thereby, including the payments of royalty made by this answering defendant from time to time to them and each and both of them, both in person and through the appropriate authorities and representatives of the Department of the Interior, and that they are thus, and both of them, estopped to allege or contend for the invalidity of the oil and gas mining lease aforesaid, or of the said agreement supplemental thereto, or of any and all assignments thereof.

VI.

Denies any knowledge or information sufficient to form a belief as to truth or falsity of any of the matters, allegations and things in the said petition herein set forth and contained save as they may have been by it in this, its separate answer thereto, admitted, qualified or otherwise alleged.

Wherefore, this answering defendant asks that the said plaintiffs herein, Webster Chisholm and Pearl Chisholm above named, take nothing as against this answering defendant by reason thereof but that they be hence with it dismissed and that it have judgment over against them for its costs and disbursements herein, and for such other and further relief as to the court it may seem it is in equity and good conscience entitled.

R. W. KELLOUGH,
FRANKLIN H. GRIGGS,
R. Y. STEVENSON,
Attorneys for Sperry Oil & Gas Company.

Rooms 401-4 Palace Building, Tulsa, Oklahoma.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Before me, a notary public in and for county and state above named, this 16th day of February, 1920, personally appeared Jas. K. Crawford, who upon oath says that he is one of the officers and the president of the Sperry Oil & Gas Company, one of the defendants in the above entitled action, and that he has read and knows
15 the contents of its foregoing and separate answer therein and that the matters and things therein stated are true.

JAS. K. CRAWFORD.

Subscribed and sworn to before me this 16th day of February, 1920.

M. M. FORD, [SEAL.]
Notary Public.

My commission expires Nov. 7th, 1922.

Filed Feb. 17, 1920.
R. P. HARRISON,
Clerk U. S. District Court.

Separate Answer of the Oklahoma Producing and Refining Corporation of America.

Comes now the defendant, Oklahoma Producing and Refining Corporation of America, above named, and for its separate answer to the petition of the plaintiffs herein alleges and states:

1.

Defendant admits that the plaintiff Webster Chisholm is a citizen of the Cherokee Nation of one-half blood, and that he is enrolled upon the final and approved rolls of said tribe or nation of Indians, opposite No. 30871, Census Card No. 10381, and that as such he was allotted and had deeded to him as his surplus and homestead allotment the lands described in plaintiffs' petition herein and attached thereto as "Exhibits A and B," respectively, and that he is now the owner of the lands and premises therein described.

2.

Defendant further admits that on or about the 14th day of May, 1904, the plaintiff Webster Chisholm made, executed and delivered a certain oil and gas mining lease to the Creek and Indiana Development Company, one of the defendants herein, covering the premises so deeded and allotted to him, which was thereafter duly approved by the Secretary of the Interior on or about May 14, 1905, a true copy thereof being attached to and made a part of the plaintiffs' petition as "Exhibit C" thereof, and that thereafter and on or about the 9th day of March, 1914, the said plaintiff, Webster Chisholm, and the Creek and Indiana Development Company entered into a further agreement supplemental to the lease aforesaid which was likewise duly approved by the Department of the Interior on or about the 3rd day of June, 1914, a true copy of said supplemental agreement or stipulation is hereto attached and marked "Exhibit A" and made a part hereof.

16 3.

Defendant further admits that on or about the 18th day of July, 1914, the Creek and Indiana Development Company, transferred and conveyed all of its rights, benefits and privileges by virtue of the aforesaid lease to the defendant Sperry Oil & Gas Company, a copy of which assignment is attached to the plaintiffs' petition and made a part thereof as "Exhibit E" and that on or about the 25th day of November, 1918, the Sperry Oil & Gas Company sold, transferred, set over and assigned and conveyed unto this defendant all of its right, title and interest in and to said oil and gas mining lease aforesaid, and which said assignment was likewise duly approved by the Department of the Interior on or about May 20, 1919, and that a true copy of said assignment is also attached to the petition of plaintiffs herein, and made a part thereof as "Exhibit F."

This defendant denies that the stipulation and supplemental agreement executed by the plaintiff and the Creek and Indiana Development Company, dated March 9, 1914, is null and void, or that the assignments from the Creek and Indiana Development Company to the Sperry Oil & Gas Company, and the assignments by the Sperry Oil & Gas Company to this defendant are null, nugatory and void, or that the same constitutes a cloud upon the title of the lands of the plaintiffs, or either of them.

4.

Defendant admits and alleges that it and its co-defendants, Sperry Oil & Gas Company and the Creek and Indiana Development Company have been in the possession of said premises and have been continuously operating the same for oil and gas purposes since May 4, 1905, and that at the time this defendant went into possession of said lands the same were in the course of development for oil and gas in accordance with the terms and provisions of the lease and supplemental stipulation aforesaid, and denies that it is unlawfully holding possession of said premises or that the plaintiffs are entitled to the full and complete possession thereof to the exclusion of this defendant, and denies that plaintiffs have been damaged in any amount by reason of the development and operation of said premises by this defendant and its co-defendants, but alleges that it has at all times kept, done and performed all of the matters and things of it required to be kept done and performed in, under and by virtue of the terms of the oil and gas mining lease aforesaid, and the said supplemental agreement or stipulation so assigned to it as aforesaid.

17 5.

This defendant denies that it is at this time operating said premises unlawfully or that it is unlawfully extracting oil and gas therefrom, and denies the necessity of a receiver to take charge of and operate said premises.

6.

This defendant admits that the plaintiffs herein Webster Chisholm and Pearl Chisholm his wife are in possession of and reside upon a certain portion of the lands and tracts referred to and covered by said lease and supplemental agreement or stipulation and that they were residing upon and in possession thereof with this defendant and its co-defendants during all of the time subsequent to on or about the month of April, 1912, and admits that said plaintiffs have been in possession of said lands with this defendant during all of the time of this defendant's ownership and possession of the same under and pursuant to the terms and provisions of the oil and gas mining lease aforesaid, and under said supplemental agreement or stipulation thereto as assigned to it as aforesaid; that said plaintiffs were at all times fully advised and wholly cognizant of whatever was done or undertaken of this answering defendant in the premises, and that the said Webster Chisholm and Pearl Chisholm in all respects with full and complete knowledge thereof voluntarily received, accepted and have retained the benefits to which they thereby became entitled under and by virtue of the terms of said lease and supplemental agreement including the payment of royalties made by this defendant from time to time to them and both of them, both in person and through the appropriate authorities and representatives of the Department of the Interior; that

by reason thereof said plaintiffs have acquiesced in and consented to the development and operations of said premises and said plaintiffs do not come into this court of equity with clean hands, and seeking equity make no offer to do equity, and that they and each of them are estopped to allege or contend for the invalidity of the oil and gas mining lease aforesaid or of the said agreement and supplement thereof or of any and all assignments thereof.

7.

Further answering herein, and not waiving any of its defenses heretofore presented, this defendant alleges and states that the oil and gas lease entered into by and between Webster and Chisholm and the Creek and Indiana Development Company which was approved on or about May 4, 1905, was executed at a time when the entire allotment of the said Webster Chisholm was restricted and inalienable under and by virtue of the Acts of Congress of
18 the United States, and under and by virtue of the terms thereof the same would expire on May 13, 1919; that at the time of the execution of the stipulation or supplemental agreement on March 9, 1914, said lands were being operated under the terms of said lease aforesaid, and were producing oil and gas in paying quantities; that said stipulation or supplemental agreement was executed in pursuance of the provisions of the Acts of Congress approved May 27, 1908 (35 Stat. L. page 312) and in pursuance of the rules and regulations of the Department of the Interior, approved April 20, 1908, and amended on February 6, and June 29, 1911; that at the time of the execution of said allotment of Webster Chisholm described as the Southeast Quarter of the Southwest Quarter of the Southeast Quarter, and the West half of the Southwest Quarter of the Southeast Quarter of Section 13, Twp. 21 North, Range 12 East, was restricted and inalienable by said plaintiff without the consent and approval of the Department of the Interior; that by reason thereof and under and by virtue of the terms of the Act of Congress of May 27, 1908, and the rules and regulations of the Department promulgated in compliance therewith, the terms and provisions which this defendant pleads and claims the benefits thereof, the said lease as a whole was under the supervision of the Department of the Interior acting under and by virtue of the laws of the Congress of the United States, whereby the execution of conveyances by allottees of Indian land conveyed good, sufficient and full title thereby when executed by such allottees.

8.

Further answering and not waiving any of the defenses heretofore presented, this defendant further alleges that under and by virtue of the terms of said stipulation or supplemental agreement aforesaid, approved on or about June 3, 1914, entered into in pursuance of the Acts of Congress of May 27, 1908, and the Rules and

Regulations of the Department of the Interior, the said plaintiffs received additional royalties; that under and by virtue of the terms of the original lease aforesaid plaintiffs received a royalty of 10% of all oil and gas produced and saved from said premises, and that under and by virtue of the terms of said stipulation or supplemental agreement, said plaintiffs received 1/8 one-eighth of all oil and gas produced and saved from said premises; that in the event of a cancellation or nullification of the said stipulation or supplemental agreement aforesaid, this defendant is entitled to receive from said plaintiffs the excess royalties so paid said plaintiffs since the date of the execution of the stipulation or supplemental agreement on March 9, 1914, in the amount of $—, for which this defendant prays judgment of the court.

19 9.

Further answering and not waiving any of its defenses heretofore presented, this defendant further alleges and states that should this court hold that this defendant is unlawfully operating and extracting oil and gas from said premises, and that this defendant has been without legal right to hold and operate said premises since March 9, 1914, then this defendant says that it has with the actual knowledge and consent of the plaintiffs been in the possession of and operated said premises during said period under — of title and with such acquiesce and consent of the plaintiffs, has expended enormous sums of money in the development and improvement of the lands of said plaintiffs, and that during said time, this defendant was permitted by the plaintiffs to proceed as if said lease was valid, and that said plaintiffs have accepted such royalties and benefits derived from the operation of said leases, and this defendant is, therefore entitled to be reimbursed for its expenditures in the development and operation of said premises; that in the operation and development of said premises this defendant has expended the sum of $76,691.32 for which amount this defendant by way of counterclaim prays judgment of the plaintiffs.

10.

Denies any knowledge *of* information sufficient to form a belief as to the truth or falsity of any of the matters, allegations and things in the said petition herein set forth and contained save as they may have been by it in this, its separate answer thereto, admitted, qualified or otherwise alleged.

Wherefore, this defendant prays that the plaintiffs take nothing by this action as against this answering defendant, but that this defendant recover its costs herein and that it have such other and further relief as in equity and good conscience it may be entitled, and this defendant further prays that in the event this defendant should be adjudged to have held and operated said premises wrongfully and unlawfully since March 9, 1914, that it have and recover of and from said plaintiffs the sum of $— as excess royalties paid

to and received by said plaintiffs, and the sum of $76,691.32, as reimbursement to the defendant for its expense in operation and development of said premises since March 9th, 1914, and for all other relief to which it may in equity and good conscience be entitled.

ALVIN RICHARDS,
Attorney for Defendant Oklahoma Producing & Refining Corporation of America.

Filed Jul. 7, 1920.
W. V. McCLURE,
Clerk U. S. District Court.

20 *Reply to Separate Answer of Defendant Oklahoma Producing & Refining Corporation of America, a Corporation.*

Comes now plaintiffs, and first obtaining leave of this court, to file this reply out of time, for their reply to the separate answer of the defendant, Oklahoma Producing & Refining Corporation of America, a Corporation, say:

I.

Plaintiffs deny each and every allegation contained in paragraphs eight and nine of said separate answer.

II.

Plaintiffs specifically deny each and every allegation in said answer and in each and every paragraph thereof which, in anywise, conflicts with or is inconsistent with the allegations of their petition heretofore filed herein.

III.

Plaintiffs respectfully move the court, to require the answering defendant, to make paragraph eight of its said answer, more definite and certain by setting forth the amount of excess royalties alleged to have been paid therein.

IV.

Plaintiffs further respectfully move the court, to require the answering defendant, to make paragraph nine of its said answer more definite and certain by setting forth the items making up the alleged expenditures therein set forth, and the dates upon which the same were so expended.

Wherefore, plaintiffs pray the judgment of this court as in their original petition set forth.

LANGLEY & LANGLEY,
Attorneys for Plaintiffs, Pearl Chisholm and Webster Chisholm.

Filed Jul. 29, 1920.
W. V. McCLURE,
Clerk U. S. District Court.

(*Substitute Opinion.*)

WILLIAMS, *District Judge:*

The following questions are essential for determination:

(1) Was it necessary for the wife to join with the husband in the modification and extending or renewal of the oil and gas mining lease on the part of the husband, the original having been executed prior to their marriage, and the homestead status having at-
21 tached subsequent to such original execution but prior to the execution of such modifying and extending or renewal instrument, both instruments having been approved by the Secretary of the Interior?

(2) Are the plaintiffs estopped from setting up the failure of the wife to join in the execution of the second instrument?

The "owner if married" may not "sell or grant" the homestead without the consent of his or her spouse, in the manner as is required by the statute. (Sec. 2, Art. 12, Constitution of Oklahoma; Sec. 303 Williams' Anno, ed.; Sec. 3343 R. L. Okl., 1910.)

The third proviso to Sec. 2, Article 12, Constitution of Oklahoma (Sec. 302 Williams' Ann. ed.) provides:

"Nothing in the laws of the United States or in the treaties with Indian tribes in the state shall deprive any Indian, or other allottee, of the benefit of the homestead and exemption laws of the state." (See State v. Rich, 204 U. S. 291; Romine v. State, 7 Wash. 215, 34 Pac. 924.)

No conveyance or contract relating to the homestead except a lease for a period not exceeding one year is valid unless in writing, subscribed by both husband and wife, where both are living and not divorced or legally separated. (Sec. 1143 R. L. Okla., 1910; Kelly v. Mosby, — Okla. —, 124 Pac. 984.) As to exceptions, see Secs. 1145 and 1146 R. L. Okla., 1910.

As determined by the Supreme Court of the State of Oklahoma, which as to such matters is controlling on this court, the wife must join with the husband in the execution of an oil and gas mining lease covering the homestead. (Carter Oil Co. v. Popp, — Okla. —, 174 Pac. 747; McCrary v. Miller, — Okla. —, 184 Pac. 782; Trease v. Shoemaker, 195 Pac. (Okla.) 767.

The term homestead, pertaining to allotments of members of the Five Civilized Tribes in Oklahoma as used in treaties and Acts of Congress, is for the purpose of classification in the imposition of restrictions. The obvious purpose was to provide a more permanent restriction for the land classed as "homestead" allotment. Under the Constitution and Statutes of Oklahoma, the tribal surplus allotment, as well as tribal homestead allotment, may constitute a rural "homestead" under the state law provided same do not comprise over one hundred and sixty acres. (See Bell v. Bush, — Okla. —, 176 Pac.

935; Norton v. Kelly, — Okla. —, 156 Pac. 1164; Hyde v.
22 Small, — Okla. —, 145 Pac. 1044; Sec. 1, Art. 12 (Sec. 302 Williams' Ann. ed.), Constitution of Oklahoma.)

In the original lease, executed May 14, 1904, for a period of fifteen years from that date, and covering the South Half of the Southeast Quarter of Section 13, Township 21 North, Range 12 East of the Indian Meridian, which constituted both his tribal "homestead" and "surplus" allotment, the lessee was granted "the right to prospect for, extract, pipe, store, refine and remove such oil and natural gas, and to occupy and use so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining and removing such oil and natural gas, including also the right to obtain from wells or other sources on said land, by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and including still further the right to use such oil and natural gas as fuel so far as it is necessary to the prosecution of said operations."

The plaintiff, Webster Chisholm, the allottee, a half-blood Cherokee Indian, at the time of the execution of the lease and its approval by the Secretary of the Interior, was a single person. Prior to March 9, 1914, on, to-wit, November 11, 1911, he married his co-plaintiff, Pearl Chisholm, and, in April, 1912, took up his residence on said tract of land, a homestead character attaching and continuing and existing when he executed, without the joinder of his said wife, the modifying and extending or renewal stipulation or lease. Neither in the original lease is any provision, either expressly or impliedly, contained stipulating for an extension or renewal of said lease on the part of said lessor, nor is such authority provided for in any rules and regulations on the part of the Secretary of the Interior then in force.

Section 72 of Act of Congress, approved July 1, 1902 (32 Stat. at L., 716), provides:

"Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and
23 not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity." (Jennings v. Wood, infra.)

By Act of Congress of April 21, 1904, it is provided that:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, and except as to homesteads, hereby removed and all restrictions upon the alienation of all other allottees

of said tribes except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied, upon a full investigation of each individual case, that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded."

On April 23, 1904, regulations were prescribed by the Secretary of the Interior permitting individual citizens of the Cherokee Nation, Indian Territory, to extract minerals from their allotments, wherein it was provided that:

(a) "Citizens of the Cherokee Nation desiring to develop their allotments for the purpose of extracting oil or gas, or mining coal or other minerals upon said lands, without entering into leases with other persons for such purposes, are required to first procure authority from the Secretary of the Interior in the following manner:"

(1) Application to be made first to the United States Indian Agent at Union Agency, and to be transmitted through the customary channels to the Secretary of the Interior for consideration; and only such applications as were of date subsequent to that of issuance of allotment certificate by the Commission to the Five Civilized Tribes to the allottees to be considered;

(2) Such application under oath to give full name of allottee, date and number of the allotment patent or certificate, together with a description of the land, and also to state fully purpose, extent, manner and character of the proposed operations, and amount of the capital or resources at hand for development and operation;

24 (3) no operation to be made through a third party;

(4) no development to be begun until approval obtained and authority granted by the Secretary of the Interior;

(5) permit to be revoked by the Secretary of the Interior if investigation demonstrates breach of conditions;

(6) United States Indian Agent to make report and recommendations.

Said rules and regulations were in force and effect when said lease of May 14, 1904, was approved.

By section 2 of Act of May 27, 1908, a limitation as to restricted lands of the Five Civilized Tribes is imposed on state agencies as to the age of minors, and also required the leases of all restricted lands for oil and gas or other mining purposes, and of such restricted homesteads, for all purposes, for more than one year, and of such restricted lands for more than five years, to be made, with the approval of the Secretary of the Interior, under rules and regulations

promulgated by him, and not otherwise. (Rogers v. Rogers, 263 Fed. 160.)

On April 20, 1908, new rules and regulations were promulgated, and on June 20, 1908, such rules and regulations for the mining of lands of the Five Civilized Tribes were repromulgated.

The renewal or extending agreement on the part of the said Webster Chrisholm which was executed on March 9, 1914, for a consideration of one dollar and other and further valuable considerations, not therein expressed, recites:

"Said lease is hereby modified so as to in all respects conform to the terms and conditions of the lease form authorized and adopted in pursuance of the amended regulations approved by the Secretary of the Interior on February 6, and June 29, 1911, * * * and all terms and conditions of said original lease contract in conflict therewith are hereby abrogated and held for naught; Provided, however, that nothing herein contained shall be construed to change the date of said above-described lease or the date from which rents and royalties thereunder shall be computed and be payable."

The land covered by this lease had been prospected and developed and oil found in paying quantities by the lessee on March 9, 1914, when by amendment and modification an attempt was made to extend said lease for a period "as much longer thereafter as oil or gas is found in paying quantities."

25 By the Act of March 3, 1901, every Indian in the Indian Territory became a citizen of the United States. (31 U. S. Stat. at Large, chap. 868, page 1447.)

Obviously this legislation was in mind when section 1 of Article 3 of the Constitution of the State of Oklahoma was framed, wherein it was provided that "male persons of Indian descent native of the United States" when possessing the necessary qualifications as to age and residence, should be qualified electors in said state.

In Jennings vs. Wood, et al., — C. C. A. —, 192 Fed. 507, involving the validity of an oil and gas lease executed by a minor of the age of fifteen years, as approved by the Secretary of the Interior, it is said:

"An approval which proceeds upon a consideration of the terms of the instrument offered and whether they are reasonably for the interests of the Indian was intended as an additional safeguard for his protection. It would not, however, reach back and supply or confirm all the essential, legal prerequisites of a valid contract. It was more a conclusive determination that the lessor, though a minor, was an adult, than that he was sound mentally or that he belonged to the class or his land was of the character covered by the statute, if in fact those conditions were wanting. The instrument went to the Secretary of the Interior as lease competently executed and he could act on that presumption. He might properly make preliminary inquiry for his further assurance and he doubtless would decline to approve if advised of fatal defects, but he was

not required to investigate and decide judicially matters lying back of and not appearing upon the face of the instrument. If he did his decision would not be conclusive."

Webster Chisholm, on March 9, 1914, at the time he executed the extension, renewal or modification of the original lease, was not only an enrolled member of the Cherokee tribe of Indians and a citizen of the United States, but also a citizen of the State of Oklahoma. When entering into a contract, it was necessary that such contract should be made in conformity with the laws of the state. In addition thereto, insofar as it affected a restriction imposed upon him or his rem as a member of said tribe by the laws of Congress, or Indian treaty, such contract must conform thereto in order to be completed or have validity.

Attention has been called to Malone v. Wamsley, et al., — Okla. —, —. Pac. —; construing Sec. 2, chap. 198, Session Laws of 1915, which provides:

26 "All petitions for the approval of deeds to lands inherited by full-blood Indian heirs shall be verified by one or more of the grantors, and shall contain" certain information.

It was there held that the state legislature had no power to enact a statute which affected the validity of a conveyance by full-blood heirs when it related to its approval by virtue of section 9 of Act of Congress approved May 27, 1908, and which in effect limited the power of such federal agency as to such approval.

The County Court, in approving such conveyance, was a federal agency acting in an administrative and ministerial capacity. Any legislative act of the State of Oklahoma which sought to limit such agency in that it would render void the conveyances if not done in the manner or in accordance with such prescribed procedure pointed out by said regulation, would be invalid. However, if such conveyance covered inherited tribal lands of the full-blood Indian heirs upon which such heir resided and to which homestead character had attached and then existed, it would be essential for the spouse of the full-blood Indian heir to join therein in order that said conveyance should be valid, although approved in accordance with such authorization by Act of Congress.

In cases of inherited tribal lands of an Indian minor, as a preliminary condition to approval by the County Court or the Secretary of the Interior, acting as a federal agency, conveyance must first be executed in the manner and by the parties as required by the state or local law. In case such inherited tribal or allotted land constitutes the family homestead the conveyance must first comply with the requirements of the state or local law as a matter preliminary to the approval by the federal agency.

In the case at bar neither was this requirement met, nor does the original lease of May 14, 1904, contain any stipulation, either expressly or implied, binding the lessor to any future extension or modification, nor did any such rule of the Interior Department in

force at that time so provide. The conclusion naturally follows that the modification, renewal, or extension of March 9, 1914, which was not joined in by the allottee's wife, as required by the Constitution and Statutes of the State of Oklahoma, was void.

2.

The allottee, Webster Chisholm, from and after March 9, 1914, the date of the supplemental agreement entered into by
27 him, collected the oil royalty on the basis of one-eighth instead of one-tenth, as provided in the original lease.

The record discloses that the first six wells were drilled and completed on said eighty-acre tract prior to March 9, 1914; that the seventh well was completed on May 20, 1916, the eighth on April 28, 1916, the ninth on July 26, 1916, the tenth on April 26th, 1917, and the eleventh on October 18, 1917. I find from the record that the wife, Pearl Chisholm, had no knowledge of the supplemental agreement or stipulation entered into by her husband, Webster Chisholm, on March 9, 1914, until after May 14, 1919; that soon after such fact was ascertained by her, to-wit: on August 4, 1919, this action was commenced. In the record it is stipulated that 7,750 barrels of oil was the gross production from said lease from May 14, 1914, the date of the expiration of the original lease, to December 31, 1920, and that the market value of such production was $22,944.40; that Webster Chisholm, one of the plaintiffs, has received pay for 968.76 barrels of the said market value in the sum of $2,868.05.

Under the facts disclosed in the record, the wife, Pearl Chisholm, is not estopped from asserting her homestead rights. Cump v. Kivo, 104 Wis. 656, 80 N. W. 937; Thompson v. Millikin, — Kan. —, 172 Pac. 534; Franklin Land Company v. Wea Gas, Coal & Oil Company, — Kans. —, 23 Pac. 630; Peterson v. Skidmore, — Kans. —, 195 Pac. 600; Ergenbright v. Henderson, 72 Kans. 29, 82 Pac. 524; Law v. Butler, — Minn. —, 47 N. W. 53; Cherokee National Bank v. Riley, — Okla. —, 155 Pac. 1140; Kelley v. Moseby, — Okla. —, 124 Pac. 984; Alton Mercantile Co. v. Spindel, — Okl. —, 140 Pac. 1168.

In an accounting, the defendant should be allowed the difference between the one-eighth and one-tenth royalty paid by it to the allottee, Webster Chisholm, after Mar. 9, 1914. It being further stipulated in the record that the sum of $2,355.81 was expended in completions of said wells after the time the supplemental stipulation was entered into on Mar. 9, 1914, and prior to December 31, 1920, in such accounting this sum should also be allowed the defendant (Muskogee Development Co. v. Green, 22 Okl. 246).

It will be necessary for an additional hearing as to the facts or a supplemental stipulation as to facts on the accounting before a final decree may be entered.

R. L. WILLIAMS,
Judge.

Filed May 10, 1921.
W. V. McCLURE,
Clerk U. S. District Court.

28 *Journal Entry of Judgment.*

Now upon this 10th day of November, A. D. 1921, the above entitled cause comes on for trial before this court at Tulsa, Oklahoma, plaintiffs appearing in person and by S. R. Lewis, O. S. Booth and Langley and Langley, their attorneys of record, and the defendants, The Sperry Oil & Gas Company, a corporation, and Oklahoma Producing & Refining Corporation of America, a corporation, appearing by their attorneys of record, Mr. Alvin Richards and Mr. Preston C. West, and all parties announcing ready for trial, and the court having heretofore heard the testimony in this cause and having considered all the proofs offered by the respective parties, and the argument of counsel, doth proceed to final determination and judgment herein and doth find that:

Heretofore on the 1st of July, 1921, this cause came on for consideration at Muskogee, respective parties appearing as hereinbefore recited, and that the court reserved its judgment thereon and took the cause under advisement until August 1, 1921, and that thereafter on the 1st day of August, 1921, the cause came on for further consideration at Muskogee, the parties appearing by their counsel as hereinbefore recited, and the court announced that his finding in the cause would be for the plaintiff and directed that the matter of accounting be referred to the Honorable A. F. McGarr as Special Master, for hearing and report to this court, and the further consideration of this cause was continued until the 10th day of November, A. D. 1921.

And it now appearing to the court that no report of the Master has been filed and that none is necessary by reason of the fact that the court is of opinion that the only judgment to which the plaintiffs herein are entitled in this action under the pleadings and the evidence is a judgment cancelling the lease or extension agreement hereinafter specifically referred to in this decree and that there is no necessity for a Master's Report or for any accounting.

And it further appearing to the court that the defendant, Oklahoma Producing & Refining Corporation of America, has heretofore field a supersedeas bond in this cause in the sum of Fifty thousand ($50,000.00) dollars, same having been so filed by it under the belief that it was necessary to do so to protect itself against any execution in this cause and that by the judgment this day rendered said bond is excessive and plaintiff should be allowed to withdraw the same,

And the court having considered the matter and being well and sufficiently advised in the premises,

29 It is by the court considered, adjudged and decreed, That the orders heretofore made on July 1, 1921, and August 1, 1921, except in so far as the same continued this cause from time to time and until the present date, be and the same are hereby cancelled and set aside and the minutes of the Clerk upon the journal of this court, except as above provided, cancelled and the defendant, Oklahoma Producing & Refining Corporation of America is hereby

authorized and permitted to withdraw the bond heretofore filed in this cause, and the surety on said bond, The American Indemnity Company, be released from all liability thereon.

And the court now on this 10th day of November, A. D. 1921, doth find as follows:

That the real estate involved in this cause, viz:

The South Half of the Southeast Quarter of section thirteen, township twenty-one north and range twelve east, situs in Tulsa County, Oklahoma,

is the allotment of the plaintiff, Webster Chisholm, a half-blood Cherokee Indian, whose Cherokee Citizen Roll Number is 30,871, said lands being regularly conveyed to him by the Cherokee Nation as his said allotment and distributive share of the tribal lands of said Nation or Tribe of Indians, and that, of the aforesaid eighty acres of land, the following parcel constitutes his tribal homestead allotment, viz.:

The West Half of the Southwest Quarter of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter of the Southeast Quarter of said section, township, range and county,

and that the remainder of said eighty acres of land constitutes the tribal surplus allotment of said Webster Chisholm, that upon May 14, 1904, the plaintiff, Webster Chisholm, whilst a single person, executed an oil and gas lease covering all of said eighty acres of lands aforedescribed, in favor of defendant, Creek and Indiana Development Company, a corporation, said lease being duly approved by the Secretary of the Interior on May 4, 1905, and that said lessee entered upon said premises and explored and discovered oil in paying quantities, and that the said lessee, Creek and Indiana Development Company, a corporation, thereafter, on July 18, 1914, sold and assigned its rights and interest in said lease unto the defendant, Sperry Oil & Gas Company, a corporation; and, that thereafter, on November 25th, 1918, the said assignee, Sperry Oil & Gas Company, a corporation, sold and assigned its rights and interest in said lease unto the defendant, Oklahoma Producing & Refining Corporation of America, a corporation, and that the last named assignee has continued to and is now operating said lease for oil and gas as afterward modified and attempted to be extended, and removing oil and gas from said lands; that the lease executed by the plaintiff, Webster Chisholm, upon May 14, 1904, aforesaid, was made for a definite period of fifteen years from its date, and that said lease expired, terminated and ended on May 14, 1919; that upon the 11th day of November, 1911, the plaintiffs, Webster Chisholm and Pearl Chisholm were legally married, and that the plaintiffs moved upon the lands involved in this cause in the spring of the year 1912, and then and there the state homestead status attached thereto, and that they have continuously and uninterruptedly since then and to this time occupied the aforedescribed land as their home and homestead under the state law; that neither of the plain-

tiffs have or possess any other real estate than that involved in this suit; that the plaintiffs have from their occupancy of said lands in the spring of year 1912 claimed the aforesaid land as their homestead, and that said lands have constituted their homestead under the constitution and statute laws of Oklahoma from their occupancy thereof in the spring of year 1912, and have so continued to be occupied by them as their homstead, and now constitutes the same, and was such homestead at the time the supplemental contract was executed by Webster Chisholm.

The court further finds that upon March 9th, 1914, the plaintiff Webster Chisholm signed, executed and delivered unto defendant, Creek and Indiana Development Company, a corporation, an instrument in writing under its terms extending in force as long as oil or gas is found in paying quantities, the lease aforementioned, and that said instrument under such terms extending in force as long as oil or gas is found in paying quantities, the lease aforementioned (the lease so extended being dated May 14, 1904) increased the royalty from one-tenth of the total production to one-eighth of the total production; that said instrument providing for the extending in force and continuing the terms of the original lease dated May 14, 1904, was not executed or joined in by the plaintiff, Pearl Chisholm, his wife, but executed only by the said Webster Chisholm; that the said Pearl Chisholm, then the wife of the said Webster Chisholm, did not join in the execution of said instrument, nor did she give her consent thereto, nor did she have knowledge thereof, and that the said Pearl Chisholm had no knowledge of the existence of said instrument extending in force and continuing the terms of said lease until after May 14, 1919, and just prior to the beginning of this action; and the court further finds that the instrument dated March 9th, 1914, extending in force and continuing the terms of the original lease aforesaid, is null and void, for the reason that the wife of the said Webster Chisholm, viz.: the said Pearl Chisholm, did not join in the execution of the same.

31 The court further finds that said instrument extending in force the terms of the original lease aforesaid was void from its date, and that the Creek and Indiana Development Company, a corporation, and its assignees thereof, as aforefound, derived no interest or privilege thereunder, and that the defendant Oklahoma Producing & Refining Corporation of America, a corporation, has since May 14, 1919, been in the unlawful partial or limited possession of said lands for oil and gas purposes, and has, since that date, unlawfully extracted oil and gas from said lands, but that defendants and each of them, were acting in perfect good faith and in the honest belief that said instrument of March 9, 1919, was valid and operative to extend the terms of the original lease.

And the court doth further find that at the original hearing of this cause on the 17th day of January, 1921, the plaintiff admitted and stipulated in open court that Webster Chisholm the original allottee and the lessor of the defendants herein and the husband of Pearl Chisholm, the other plaintiff in this action, but without the consent or knowledge of his said wife, had received the royalties paid

in to the Indian Agent during the time that any part of said lands were restricted and that since the removal of restrictions by the Secretary of the Interior on the Indian homestead portion of the lands involved (which is admitted in open court to have been in the month of November, A. D. 1919) the said Webster Chisholm has received all the royalties accruing under the lease and the attempted extension thereof from the pipe line company, but that his wife Pearl Chisholm received no part thereof from defendants, and that it is now and here in open court admitted by the plaintiff that all of said royalties have been paid to him down to the 1st of the current month, and the court doth find that such payment to and acceptance by the said Webster Chisholm constitutes a settlement for and on account of the oil produced and received from the premises by the defendants and a waiver of any right to demand any other or further portion of the oil so taken and saved from the premises by the defendants or to have any accounting therefor or to receive any other or further payment for or on account thereof up to Nov. 1, 1921, but the court further states as a fact on this record that defendants have not heretofore urged the taking of said royalties as a waiver of or estoppel against the right in the said Webster Chisholm, and Pearl Chisholm to have the validity of said instrument here adjudicated but only as a waiver or estopped to demand an accounting for the value of the oil taken, but further that they have contended and insisted that the receipt and acceptance of said royalties constitute an affirmance and ratification of the contract of extension hereinbefore referred to and give the defendant lessees the right to pro-
32 duce oil from the premises and to have and retain seven-eighths of the oil so produced upon paying the other one-eighth to Webster Chisholm as royalty. The court finds that the wife Pearl Chisholm at no time received any part of said royalty and did not know of the supplemental contract until in the summer of 1919.

It is therefore by the court further ordered, adjudged and decreed that the instrument executed by the plaintiff, Webster Chisholm, dated March 9, 1914, extending in force the original lease dated May 14, 1904, be, and the same is hereby adjudged null and void and of no effect, and that the lessee, Creek and Indiana Development Company, and the assignee, Sperry Oil & Gas Company, and the assignee, Oklahoma Producing & Refining Corporation of America, a corporation, derived no right, title, interest or privilege in and to said lands by virtue thereof.

It is further ordered, adjudged and decreed by the court, That the plaintiffs, Webster Chisholm and Pearl Chisholm, be, and they are hereby adjudged to be entitled to the immediate, full and complete and exclusive possession of the lands involved in this suit, and the defendant Oklahoma Producing & Refining Corporation of America, a corporation, is adjudged to have no right, title or interest in and to the lands involved in this suit, and for any purpose whatever, and that said defendant, Oklahoma Producing & Refining Corporation of America, a corporation, be and is hereby enjoined from interfering with plaintiffs' full and exclusive possession of said premises.

To all of which findings, holdings, judgment and decree, and the making, rendering and entering of said decree, findings, orders and judgment, and every part thereof, the defendants now and here in open court object and except, and now and here in open court give notice of an appeal to the United States Circuit Court of Appeals for the Eighth Circuit and now and here in open court pray an appeal from the findings, judgment and decree of this court to the said, the United States Circuit Court of Appeals for the Eighth Circuit, which exceptions and which appeal are by this court allowed.

And the said defendants in open court ask that the execution of said decree and judgment be stayed for sixty days for the purpose of allowing the defendants to execute their supersedeas bond and prepare the record for appeal; all of which is by the court now and here in open court allowed and execution on the within judgment and decree hereby stayed for sixty days from this date pending execution by the defendants of a supersedeas bond on appeal
33 which said supersedeas bond on appeal is fixed in the sum of Fifteen thousand ($15,000.00) dollars

R. L. WILLIAMS,
Judge of the District Court of the United States for the Eastern District of Oklahoma.

O. K. as to Form:
O. S. BOOTH,
S. R. LEWIS,
LANGLEY & LANGLEY,
Attorneys for Plaintiff.

Filed in Open Court Nov. 10, 1921.
W. V. McCLURE,
Clerk U. S. District Court.

(*Statement of the Evidence.*)

In the United States District Court in and for the Eastern District of Oklahoma.

Equity. No. 2596.

PEARL CHISHOLM et al., Plaintiffs,

vs.

CREEK & INDIANA DEVELOPMENT CO., Defendants.

Appearances:

Messrs Langley & Langley and Mr. S. R. Lewis and Mr. O. S. Booth, attorneys for plaintiffs.
Mr. Alvin Richards and Mr. P. C. West, attorneys for defendants.

Be it remembered, that on this the 17th day of January, 1920, this cause coming on for hearing before the Honorable R. L. Williams, United States Judge, sitting at Tulsa, Oklahoma, and counsel

for plaintiffs, and counsel for defendants announcing to the court that they were ready for trial, the following proceedings were had, to wit:

Whereupon PEARL CHISHOLM, one of the plaintiffs, being first duly sworn according to law, was called to the witness stand and testified as follows, to wit:

Direct examination of Pearl Chisholm.

By Mr. Langley:

Q. State your name?
A. Pearl Chisholm.
Q. Where do you live?
A. Near Sperry.
Q. Married or single?
A. Married.
Q. What is your husband's name?
A. Webster Chisholm.
Q. He the other plaintiff in this action?
A. Yes, sir.
Q. When did you marry?
A. October 11, 1919—1911.
Q. Where?
A. Sapulpa, Oklahoma.
Q. Where did you move to and make your home after your marriage?
A. On his allotment.
34 Q. On Webster Chisholm's allotment?
A. Yes, sir.
Q. Where did you live, have you lived since you moved on Webster's Chisholm's allotment?
A. Same place.
Q. That his Cherokee allotment of lands?
A. Yes, sir.
Q. Conveyed to him by the Cherokee Nation?
A. Yes, sir.
Q. What improvements were located on the land when you moved on it?
A. Nothing—only just a little one-room barn like.

The Court: Better describe the land so it will correspond with the lease—if there is any controversy about it.
Mr. West: No controversy about what land the lease embraces.
Mr. Richards: No controversy about that.
The Court: Is it admitted they moved on the homestead?
Mr. West: They have moved on the Indian homestead.
The Court: Your husband's homestead?

Q. How many acres of land your husband own there where you live?

A. Eighty.
Q. Consisting of his Cherokee homestead and surplus allotment of land?
A. Yes, sir.
The Court: How many acres homestead—thirty acres?
Mr. West: Yes, sir, and fifty acres surplus.
The Court: Fifty acres surplus?
Mr. West: Yes, sir.
The Court: The lease covers eighty acres?
Mr. West: Yes, sir, the original lease and supplemental agreement covers this property as an entirety.
The Court: You concede the lease is not valid as to the surplus allotment?
Mr. West: No, sir.
The Court: Restrictions off the surplus?
Mr. West: Yes, but the restrictions were off—but incumbered at that time by this lease and the rules and regulations of the Secretary of the Interior provide what shall be done in the event of any relinquishment of restrictions on any part of the land and how it shall be segregated. The royalties have been paid on this land from the beginning as an entirety to the Department of the Interior down to the present time.

Mr. Langley: Restrictions were removed on the surplus
35 act of Congress, 1908, and they are living on the eighty acres of land.

Q. What improvements have you put on the eighty acres of land?
A. Fenced and built a three-room house and out buildings.
Q. Where have you lived continuously since that time?
A. On this same place.
Q. Do you own any other land besides this?
A. No, sir.
Q. Does your husband, Webster Chisholm, own any other land besides this?
A. No, sir.

The Court: How long have you lived on it?
A. Ever since 1912.
The Court: And lived on it as your homestead?
A. Yes, sir.
The Court: Very well, proceed.

Q. What family have you and your husband?
A. Have two children.
Q. Where were they born with reference to this land?
A. One born—mine—on this land, and the other his child.
Q. How much of the land in cultivation?
A. Well, I don't know exactly how much is in cultivation.
The Court: Half of it?
A. I presume half of it is.
Q. Do you use the entire eighty acres?
A. Yes, sir.

Q. In common?
A. Yes, sir.
Q. Both together?
A. Yes, sir, use the rest for pasture.
Q. All under one fence?
A. Yes, sir.

Cross-examination of Pearl Chisholm.

By Mr. West:

Q. Mrs. Chisholm, you and your husband went on this land in the spring of 1912?
A. Yes, sir.
Q. Was there a house standing there at the time you went on it?
A. We built the house ourselves.
Q. Where did you build your house, what part of the land?
A. We built it——

The Court: On the homestead part or surplus part, or do you know?
A. I don't know exactly where the line is.

Q. You know where the house is?
A. Yes, on the homestead.
Q. It is on the west part of your land?
A. Northwest corner.
Q. Near the northwest corner of this fifty acres of land?
A. Yes, sir.
Q. And the barn is there near the house?
A. Yes, sir.
Q. The land that lies on the surplus part has no other improvements on it than the fence?
A. We use it as a pasture.
Q. As a pasture and fence on it?
A. Part of the surplus supposed to be in cultivation.
Q. Cultivate some?
A. Yes, sir.
Q. But your residence and barn and the part you are actually living on is that near the northwest corner of the tract and is on the Indian homestead part?
A. Yes, sir.
Q. You knew when you married Chisholm there was a lease on it, Governmental lease?
A. Yes, sir.
Q. You knew that he afterwards executed a further paper with regard to that?
A. I did not understand.
Q. You knew he afterwards executed an agreement about that lease which was approved by the Secretary of the Interior?
A. No, sir.

Q. Did not know about that?
A. No, sir.
Q. When did you first hear about that?
A. When our lease supposed to be up in 1919, went to get our lease back and spoke to Mr. Lewis about it and he investigated and found out about it for us.
Q. Why do you say in your pleadings the original lease had expired in 1914?

The Court: Well, now she would not know what was in the pleadings.
Mr. West: It goes to her knowledge.
The Court: Yes, but the ordinary client is not supposed to know what is in the pleadings.

Q. Is it not a fact you told your attorney that the lease expired in 1914, and didn't you bring this suit on that theory?

A. No, sir.
Q. Did not tell him that?
A. No, sir.
Q. If he put it in the pleadings, he put it in there on his own motion?
A. Our lease supposed to expire 1919.
Q. That is what you have been told recently?
A. No, sir, that is on our lease papers.
Q. When did you first see the lease papers?
A. I did not remember the exact date.
Q. Before this suit was brought?
A. Yes, I read the papers before then.
Q. When did you first see the other paper he executed?
A. Which is that?
Q. The agreement he made about this lease after that?
A. I have never seen no paper yet.
Q. You have never seen it?
A. No, sir.
Q. Don't you know about it?
A. No, sir.
Q. You do know your husband has been getting the royalties on that land all this time?
A. Yes, sir.
37 Q. Does he use the money for the upkeep of his family?

Mr. Langely: I object as being incompetent, irrele*l*evant and immaterial.
Mr. West: The question of estoppel is an important proposition.
The Court: Have you plead estoppel?
Mr. West: Yes, sir.
The Court: I will let you prove it but I am not going to find on estoppel.

Q. Your husband used the money he received from the royalties for taking care of the family?
A. He pays the grocery bill ——

Q. And spent it for other things for the family?
A. I suppose so.
The Court: How many wells on that land?
A. Nine.
The Court: The royalty?
A. On the eighty?
The Court: How many on the homestead and how many on the surplus?
A. There is three on the homestead.
The Court: And six on the surplus?
A. Yes, sir.
The Court: I would like to know how much the royalty is on the three on the homestead and how much the production is on the six on the surplus.
Mr. West: That could not be stated for the lease has been operated as one lease and not otherwise.
The Court: You don't claim that when the restrictions expired under that——
Mr. West: Yes, sir. We claim that lease was made under the supervision of the Secretary of the Interior and any modification desired to be made by allottee could be made so long as the party had complied with the regulations with reference to what should be done in case partial restrictions were taken off part of the land, but if that were not true, the Indian homestead being still absolutely restricted, still under the supervision of the Secretary of the Interior, I don't think by living upon that part of the tract the homestead claim could be extended on to the other part or tract. I have a number of cases in which persons have lived——
The Court: That is an entire tract, eighty acres?
38 Mr. West: Yes, sir——
The Court: And they could pass it on to a hundred and sixty acres——
Mr. West: Yes, a hundred and sixty acres, whatever the amount of land was. There is not any question, I take it, but that so far——
The Court: I find from the fact they used that entire eighty acres of land as a homestead under the state law——
Mr. West: I understand that is your honor's view of the facts, but I have a number of cases here where for any reason the homestead could attach to the identical tract upon which the person was living, although he was using in connection——
The Court: I am going to hold this is one entire tract for homestead purposes, that the designation of a homestead and surplus is merely for the purpose of allotting and difference in restrictions, but this is an entire tract and their homestead.
Mr. West: But if their homestead rights could not attach against this lease as to the part on which he was actually not a resident, the authorities say it could not extend across the line as to something else——
The Court: I will look into the authorities, But I am going to find the fact now that that was their homestead under this evidence.
Mr. West: The lease is one entire lease.

Q. Now, Mrs. Chisholm, there has been a number of wells drilled on that land since you went on there?
A. There has been several.
Q. Was there not a well drilled there in 1913?
A. I don't know the exact dates when they were drilled.
Q. You do know the last five or six wells have been drilled upon the land since you went on there to live?

The Court: Since the first lease expired?
Mr. West: No, sir. There has been none since the expiration of the original ten years.

A. I know there was four. I do not remember how many.
Q. Have there not been in fact six wells drilled?
A. I could not swear to that.
Q. You know there has been as many as four?
A. Yes, sir.
Q. And some of them have been drilled on the Indian homestead part south of the house?
A. Three on the homestead.
Q. And some have been drilled on other parts of the land while you were living there?
39 A. I remember one of them, a dry hole.
Q. You saw those operations going on?
A. Yes, sir.
Q. How many wells on there—were there on the land at the time you went on it?
A. I do not remember.
Q. There were some?
A. Yes, sir.
Q. Were there not three wells producing and one dry hole on there at the time you went there?
A. I do not remember how many wells producing, but I know one dry hole.
Q. And several wells producing?
A. I don't know how many.
Q. But you don't say there was several producing oil?
A. There was some on there but I could not say how many.

Further direct examination of Mrs. Chisholm.

By Mr. Booth:

Q. There has been no wells drilled on the eighty acres since May, 1919, since the original lease expired?
A. No, sir.
Q. There has been altogether nine wells drilled?
A. Yes, sir.
The Court: Wells that produce oil?
A. Yes, sir.
Q. Nine producing wells?
A. Yes, sir.

Q. Judge West asked you in reference to your knowledge as to his paper Webster gave them, a new agreement, when did you first discover there was any new agreement?
A. When we thought our lease was up in 1919.
Q. And you consulted who about that time?
A. Mr. Lewis.
Q. Your attorney?
A. Yes, sir.
Q. And information as to a new lease on it obtained from him?
A. Came to find out he had made a new lease, first we knew about it.
Q. First you knew about it?
A. Yes, sir.

Witness dismissed.

Mr. Langley: That is all the testimony we have as to that. There an accounting for damages for extractions of oil and gas later ——

The Court: You are trying your own case.

Mr. Langley: We have an agreement as to the amount of royalty.

Mr. West: That is coupled with the agreement that the royalties ave been paid as in the beginning.

Mr. Langley: It is admitted that Webster Chisholm, the husband, received the royalties paid into the Indian Agent and also since restrictions were removed on the entire tract, it is stipulated he has received the royalty, one-eighth from the pipe ne company and also admitted the wife has not received any checks om them.

The Court: If the oil was segregated from the ground and he nt and accepted the royalty as his part he would be bound by it, though the lease would be void. I think that would be a settlement—that would be a completed contract as to that.

Mr. Langley: Your honor hold the wife is bound by the action the husband?

The Court: She has no interest in it if it is segregated. This is r her protection and the Supreme Court holds that extends to ses. By virtue of that she could have it set aside and have an counting under that—but if in the meantime her husband has ne and—well, I will not pass on that now.

Mr. Booth: It is our contention as to that, after May 14, 191-, en the old lease expired, and it was void, the entire production longs to the parties and not one-eighth and could not be estopped m receiving one-eighth. The company would still have to account for the other seven-eighths, would not be estopped by taking raction.

The Court: If they had a void contract and went in and drilled s under a live contract and they accepted the royalties and afterrds it became personal property, I would be inclined to hold they re bound by it.

Mr. Langley: We want to be heard on that—as to these ounts——

The Court: Read them into the record. Give them to the stenographer and he will put it in the record.

Mr. Booth: It is agreed that 7,750 barrels is the gross production from May 14th, 1919, to December 31, 1920. The market value of the gross production, $22,944.40, as the gross amount of oil produced from the land during that period and that Webster Chisholm, one of the plaintiffs, received pay for 968.76 barrels of the market value of $2,868.05.

Mr. Richards: Yes, that is agreed to.

Mr. Booth: It is further agreed that Webster Chisholm from and after March 9, 1914, the date of the supplemental agreement, received payment for the oil on the basis of one-eighth royalty instead of one-tenth royalty as provided in the original lease.

Mr. Richards: It is further agreed that the sum of $2,355.81 has been the total expense of the operation of the property by
41 the defendant since May 15, 1914, to January 1, 1921.

Mr. Langley: Plaintiff rests, your honor.

Mr. West: If the court please, we offer in evidence the original oil and gas mining lease made on the 14th day of May, 1904, between the allottee and the Creek and Indiana Development Company as our exhibit 1.

Mr. Langley: No objections.

The Court: It is admitted.

Mr. West: The stipulation of March 9, 1914, between Webster Chisholm and the Creek & Indiana Development Company extending this lease and substituting the latter form, all of which was approved by the Secretary of the Interior, as defendant's exhibit 2.

The Court: The proof show there was any development made after this stipulation?

Mr. West: Yes, sir.

Mr. Langley: Some of it was.

Mr. West: We have the lease here.

The Court: Better introduce that.

Mr. West: Also plat of the eighty acres in question as exhibit 3, showing the Indian homestead, the location of the residence of plaintiff in this case and the wells that have been drilled on this entire premise, with the dates of their completion.

The Court: Any objection to that?

Mr. Booth: No, sir, no objections.

The Court: Let the record show that the map is introduced by agreement as to its recitals.

Mr. West: We also desire, if your honor please, to introduce section [—] page 34 of the rules and regulations promulgated by the Secretary of the Interior.

The Court: Very well.

Mr. West: And also section 42.

Mr. Booth: To which the plaintiffs object for the reason the sections offered were not adopted nor promulgated until long after the stipulation was entered into in this case.

The Court: Let the records show when they were adopted and

promulgated. The court takes judicial knowledge they are not matters of evidence, matters of convenience to the court.

42 Mr. Booth: Is that admitted?

Mr. West: No, sir, they were approved, Washington, D. C., April 20, 1908, and refers to leases on and after January, 1908. Of course they have issued amended regulations from time to time.

Mr. Booth: I withdraw the objection, then.

Mr. West: We rest, your honor. We would like to withdraw the original stipulation and leave in the files a copy.

DEFENDANT'S EXHIBIT No. 1.

(NOTE.—The following is attached to first page of Oil and Gas Mining Lease.)

Lease No. 2143.

5-154r.

Department of the Interior,
Washington, D. C., Aug. 20, 1914.

The assignment of this lease by the Creek & Indiana Development Co., lessee, to the Sperry Oil and Gas Co. in so far as the S. E. 4 of S. W. 4 of S. E. 4 and the W. 2 of S. W. 4 of S. E. 4 of Sec. 13, of twp. 21, rge. 12 is concerned is approved, effective only from date of approval, subject to the orders and regulations of this department now existing or hereafter to be promulgated. The price basis for computation of royalty on oil shall be the market price as ascertained and declared by the Secretary of the Interior, and the royalty shall be 12½ per cent on such basis.

(Signed) BO SWEENEY,
Assistant Secretary.

E. B. M.
Original.
Transferable only with consent of the Secretary of the Interior.

Oil and Gas Mining Lease.

Upon land selected for allotment, Cherokee Nation, Indian Territory (Section 72, Act of July 1, 1902—32 Stats., 716, 721).

This indenture of lease, made and entered into, in quadruplicate, this 14th day of May, A. D. 1904, by and between Webster Chisholm of Turley, I. T., party of the first part, and Creek and Indiana Development Company, a corporation duly organized and existing under the laws of the Territory of Arizona, U. S. A. of Phœnix, viz., party of the second part, under and in pursuance of the provisions of section 72 of the Act of Congress, approved July 1, 1902, and the regulations prescribed by the Secretary of the Interior thereunder.

Witnesseth: That the party of the first part, for and in consideration of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid, observed and performed by the party of the second part, its successors

and assigns, does hereby demise, grant and let unto the party of the second part, its successors and assigns, for the term of fifteen years from the date hereof, all of the oil deposits and natural gas in or under the following described tract of land, lying and being within the Cherokee Indian Nation, and within the Indian Territory, to-wit:

The south half of the southeast quarter of section thirteen, township 21 north, range 12 east of the Indian Meridian, and containing eighty (80) acres, more or less, with the right to prospect for, extract, pipe, store, refine and remove such oil and natural gas, and to occupy and use so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining and removing such oil and natural gas, including also the right to obtain from wells or other sources on said land, by means of pipe lines or otherwise a sufficient supply of water to carry on said operations, and including still further the right to use such oil and natural gas as fuel so far as it is necessary to the prosecution of said operations.

In consideration of which the party of the second part hereby agrees and binds itself, its successors and assigns, to pay or cause to be paid to the lessor as royalty the sum of ten per cent of the value, on the leased premises, of all crude oil extracted from the said land, and if the parties do not before the tenth day of the month, succeeding its extraction, agree upon the value of the crude oil on the leased premises, the value thereof shall finally be determined under the direction of the Secretary of the Interior in such manner as he may prescribe, and to so pay the royalty accruing for any month on or before the twenty-fifth day of the month succeeding, and where the value of the crude oil fluctuates the average value during the month shall constitute the criterion in computing the royalty and to pay in yearly payments, at the end of each year, such royalty on each gas producing well as the Secretary of the Interior may prescribe, the lessor to have free the use of gas for lighting and warming his residence on the premises. But failure on the part of the lessee to use a gas-producing well where the same cannot be reasonably utilized at the rate so prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil.

And the party of the second part further agrees and binds itself, its successors and assigns, to pay or cause to be paid to the lessor, as advanced annual royalty on this lease, the sums of money as follows, to-wit: Fifteen cents per acre per annum, in advance, for the first and second years; Thirty cents per acre per annum,
41 in advance, for the third and fourth years; And seventy-five cents per acre per annum, in advance, for the fifth and each succeeding year thereafter of the term for which this lease is to run; it being understood and agreed that said sums of money so paid shall be a credit on the stipulated royalties should the same exceed such sums paid as advanced royalty, and further, that should the party of the second part, neglect or refuse to pay such advavnced annual royalties for the period of sixty days, after the same becomes due and payable, then this lease shall, at the option of the lessor be

null and void, and all royalties paid in advance shall become the money and property of the lessor.

The party of the second part further covenants and agrees to exercise diligence in the sinking of wells for oil and natural gas on the lands covered by this lease and to execute the same in a workmanlike manner to the fullest possible extent, inavoidable casualties excepted; to commit no waste upon the said land, and to suffer no waste to be committed upon the portion in its occupancy or use; to take good care of the same, and to promptly surrender and return the premises upon the termination of this lease to the party of the first part or to whomsoever shall be lawfully entitled thereto, and not to remove therefrom any buildings or improvements erected thereon during the said term by the said party of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other considerations herein specified, excepting the tools, boilers, boiler-houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells, shall remain the property of said party of the second part, and may be removed at any time before the expiration of sixty days from the termination of the lease; that it will not permit any nuisance to be maintained on the premises under its control, nor allow any intoxicating liquors to be sold or given away for any purpose on said premises; that it will not use such premises for any other purpose than that authorized in this lease, and that before abandoning any well it will securely plug the same so as to effectually shut off all water above the oil bearing horizon.

And it is mutually understood and agreed that no sublease, assignment or transfer of this lease or of any interest therein or thereunder can be directly or indirectly made without the written consent thereto of the lessor and the Secretary of the Interior first obtained, and that any such assignment or transfer made or attempted without such consent shall be void.

45 And the said party of the second part further covenants and agrees that it will keep an accurate account of all oil mining operations, showing the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and other personal chattels used in said prospecting and mining operations, and upon all the oil obtained from the land herein leased, as security for the payment of said royalty.

And the party of the second part agrees that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation.

And the said party of the second part expressly agrees that [—] it or its sub-lessees, heirs, executors, administrators, successors or assigns, violate any of the covenants, stipulations, or provisions of this lease, or fail for the period of sixty days to pay the stipulated

monthly royalty provided for herein, then the party of the first part shall be at liberty, in — discretion, to avoid this indenture of lease and cause the same to be annulled, when all the rights, franchises and privileges of the party of the second part, its sub-lessees, heirs,, executors, administrators, successors or assigns hereunder shall cease and end without further proceedings.

If the lessee makes reasonable and bona fide effort to find and produce oil in paying quantities as is herein required of it and such effort is unsuccessful, it may at any time thereafter, with the approval of the Secretary of the Interior, surrender and wholly terminate this lease upon the full payment and performance of all its then existing obligations hereunder: Provided, however, that approval of such surrender by the Secretary will be required only during the time his approval of the alienation of the land is required by law.

It is further agreed and understood that this lease shall be of no force or effect unless the party of the second part shall, within sixty days from the date of approval of the application filed in connection herewith, furnish a satisfactory bond in accordance with the regulations of May 4, 1903, prescribed by the Secretary of the Interior, which shall be deposited and remain on file in the Indian Office during the life of this lease.

In witness whereof the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

[SEAL.] (Signed) WEBSTER his x mark CHISHOLM.

46 (Signed) CREEK AND INDIANA DEVELOPMENT CO.,
By CHARLES BIERHAUS,
President of Creek and Indiana Development Company.

Attest:
(Signed) CHARLES A. WEISERT,
[SEAL.] *Secretary of Creek and Indiana Development Company.*

Two witnesses to execution by lessor:
(Signed) SEYMOUR RIDDLE,
P. O. Vinita, I. T.
BERT HENDREN,
P. O. Indianapolis, Ind.

Two witnesses to execution by lessee:
(Signed) JOHN H. BROCKMAN,
P. O. Vincennes, Ind.
JOHN KIRSCH,
P. O. Vincennes, Ind.

Affidavit of Witnesses.

UNITED STATES OF AMERICA,
Indian Territory,
Northern Judicial District, ss:

Seymour Riddle, of Vinita, I. T. and Bert Hendren, of Indianapolis, Ind., witnesses to the attached lease executed by Webster Chisholm, of Turley, I. T., to Creek and Indiana Development Company, of Phoenix, Arizona, being by me first duly sworn, upon their oaths, state, each for himself: That said lease was in their presence read and fully explained to the lessor, and that he understood the nature, contents and effect thereof, and approved of the same.

(Signed) SEYMOUR RIDDLE.
BERT HENDREN.

Subscribed in my presence and sworn to before me this 14 day of May, 1904.

[SEAL.] (Signed) J. L. HARNAGE,
Notary Public.

My commission expires Aug. 5, 1907.

Certificate of Officer Taking Acknowledgment.

UNITED STATES OF AMERICA,
Indian Territory,
Northern Judicial District, ss:

I, J. L. Harnage, Tahlequah, I. T., a notary public within
47 and for the Northern District of the Indian Territory, do hereby certify that Seymour Riddle, of Vinita, I. T., and Bert Hendren, of Indianapolis, Ind., witnesses to the attached lease, executed by Webster Chisholm, of Turley, I. T., to Creek and Indiana Development Company, of Phoenix, Arizona, signed the same in my presence at the request of lessor; that they are personally well known to me; that I know of my own knowledge that they are reputable persons and entitled to full faith and credit.

Witness my hand and seal as such notary public on this 14 day of May, 1904.

(Signed) J. L. HARNAGE,
[SEAL.] *Notary Public.*

My commission expires Aug. 5, 1907.

Endorsed: 75250 1905 Original. Department of the Interior, Washington, D. C. Oil and Gas Mining Lease. Cherokee Nation, Indian Territory. Webster Chisholm of Turley, I. T. to Creek & Indiana Development Company of Phœnix, Ariz. of S. 2 of the S. E. 4 Sec. 13 township 21 N., Range 12 E. in the Cherokee Nation, Indian Territory, containing 80 acres. Date May 14, 1904, Expires May 13, 1915.

27448. Indian Office. 1905.

Department of the Interior,

U. S. Indian Service Union Agency.

Muskogee, I. T., Apr. 4, 1905.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved. See my report of even date.

J. BLAIR SHOENFELT,
U. S. Indian Agent.

J. F. W.

Department of the Interior,

Office of Indian Affairs.

Washington, D. C., Apr. 26, 1905.

Respectfully submitted to the Secretary of the Interior with recommendation that it be approved.

C. H. LARRABEE,
Acting Commissioner.

Department of the Interior.

Approved. Washington, D. C., May 4, 1905.
THOS. RYAN,
Acting Secretary of the Interior.

H. G. S.

Department of the Interior. Received Apr. 17, 1905. Enc. No. 2 of No. 4526 Indian Territory Division.

UNITED STATES OF AMERICA,
Indian Territory,
Northern Judicial District, ss:

Be it remembered, that on this date came before me, the undersigned notary public within and for the northern judicial district of the Indian Territory aforesaid, duly commissioned and acting as such — to me personally well known as the party lessor in the within and foregoing indenture of lease, and stated that — had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

48 Witness my hand and seal as such notary public on this 14 day of May, 1904.
(Signed) J. L. HARNAGE,
Notary Public.

My commission expires Aug. 5, 1907.

Acknowledgment of Corporation (Lessee).

STATE OF OKLAHOMA,
Muskogee County, ss:

Before me, a notary public, in and for said county and state, on this 14th day of March, 1914, personally appeared J. B. Gregory, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its president, and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of such corporation for the uses and purposes therein set forth.

[SEAL.] (Signed) ETHEL P. KERR,
Notary Public.

My commission expires Oct. 1, 1916.

Consent of Surety.

The Equitable Surety Company of St. Louis, Mo., surety for Creek and Indiana Development Co., on the bond covering the lease above described, hereby consents to the above modifications of the terms of the said lease and agree that said bond shall secure any and all additional obligations assumed by the lease owner herein.

Dated at Muskogee, Okla., this 16th day of March, 1914.

(Signed) EQUITABLE SURETY COMPANY.,
By E. J. PHELPS.

Department of the Interior.

Washington, D. C., June 3, 1914.

Approved: As to S. E. S. W. S. E. & W. 2 S. W. S. E. 13-21-12. Lessor's homestead.

LEWIS C. LAYLIN,
Assistant Secretary.
E. B. M.

DEFENDANT'S EXHIBIT No. 2.

Stipulation Modifying Terms of Oil and Gas Mining Lease.

(To be Executed in Quadruplicate.)

Whereas, Webster Chisholm of Turley, I. T. as lessor and Creek and Indiana Development Company, of Phoenix, Ariz., as lessee, entered into an oil and gas mining lease dated May 14, 1904, covering the following described land allotted to Webster Chisholm, and situate in Tulsa County, State of Oklahoma, to-wit:

The south half of the southeast quarter of section 13, township 21 north, range 12 east, and containing 80 acres, more or less.

49 Whereas, the present owner of said lease and the owner of the said described land desire to amend, change and modify certain terms of said contract.

Now Therefore, in consideration of the sum of One ($1.00) Dollar, the receipt whereof is hereby acknowledged by the lessor, and other and further valuable considerations, said lease is hereby modified so as to in all respects conform to the terms and conditions of the lease form authorized and adopted in pursuance of the amended regulations approved by the Secretary of the Interior on February 6, and June 29, 1911, a copy of which lease form, marked Exhibit "A," is attached hereto and made a part hereof, and all terms and conditions of said original lease contract in conflict therewith are hereby abrogated and held for naught; Provided, However, that nothing herein contained shall be construed to change the date of said above described lease or the date from which the rents and royalties thereunder shall be computed and be payable.

In Witness Whereof, the parties hereunto have affixed their signatures this 9th day of March, 1914.

(Signed) WEBSTER CHISHOLM (thumb mark). [SEAL.]
CREEK AND INDIANA DEVELOPMENT COMPANY,
By J. B. GREGORY, [SEAL.]
Its President.

Attest:
C. L. THOMAS,
Secretary.

Two witnesses to execution by lessor:
(Signed) R. MARTIN,
P. O. Sperry, Okla. Postmaster.
CHAS. W. GRIMES,
P. O. Tulsa, Okla.

Two witnesses to execution by lessee:
(Signed) ETHEL P. KERR,
P. O. Muskogee, Okla.
E. J. PHELPS,
P. O. Muskogee, Okla.

Acknowledgment of Lessor.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Before me, Chas. W. Grimes, a notary public, in and for said county and state, on this 9th day of March, 1914, personally appeared Webster Chisholm to me known to be the identical person

who executed the within and foregoing instrument, and acklowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

(Signed) C. W. GRIMES, [SEAL.]
Notary Public.

My commission expires February 17, 1915.

50 EXHIBIT "A."

Form A, Series of 1908. Approved April 20, 1908. Amended February 6 and June 29, 1911.

Oil and Gas Mining Lease Upon Lands Selected for Allotment.

—— Nation, Oklahoma.

This indenture of lease, made and entered into in quadruplicate on this — day of ——, A. D. 191-, by and between —— ——, of the ——, enrolled as a — blood citizen of the —— Nation, Roll No. —, party of the first part, hereinafter designated as lessor, and —— ——, of ——, party of the second part, hereinafter designated as the lessee, under and in pursuance of the provisions of the act of Congress approved May 27, 1908 (35 Stat. L., p. 312), Witnesseth:

1. The lessor, for and in consideration of One Dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following described tract of land, lying and being within the County of —— and State of Oklahoma, to-wit: The — of Section —, township —, range —, of the Indian Meridian, and containing — acres, more or less, with the exclusive right to prospect for, extract, pipe, store, and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells or other sources on said land by means of pipelines or otherwise, a sufficient supply of water to carry on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to pay or cause to be paid to the United States Indian Superintendent, Union Agency, Muskogee, Oklahoma, for the lessor, as royalty, the sum of — per cent of the gross proceeds of all crude oil extracted from the said land, such payment to be made at the time of sale or removal of the oil. And the lessee shall pay as royalty on each gas producing well three hun-

dred dollars for annum in advance, to be calculated from the date of commencement of utilization: Provided, however, in the case
51 of gas well of small volume, when the rock pressure is one hundred pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty which will become effective as a part of this lease: Provided, further that in cases of gas wells of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such an extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling or pumping operations on adjacent or nearby tracts, the lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises, provided there be surplus gas produced on said premises over and above enough to fully operate the same.

Failure on the part of the lessee to use a gas producing well, which cannot profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas producing privileges, the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from date of discovery of gas, on each gas producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease. Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

3. Until a producing well is completed on said premises the lessee shall pay, or cause to be paid, to the Superintendent, Union Agency, Muskogee, Oklahoma, for lessor, as advance royalty, from the date of the approval of this lease, fifteen cents per acre per annum, annually, in advance, for the first and second years; thirty cents per acre per annum, annually, in advance, for the third and fourth years; seventy-five cents per acre, per annum, annually, in advance, for the fifth year; and one dollar per acre, per annum, annually, in advance, for each succeeding year of the term of this lease; it being understood and agreed that such sums of money so paid shall be a credit on the stipulated royalties and the lessee hereby agrees that said advance royalty shall not be refunded to the lessee because of any subsequent surrender or cancellation thereof; nor shall the lessee be relieved from its obligation to pay said advance royalty annually when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

52 4. The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by this lease and shall drill at least one well thereon within one year from the date of approval of this lease by the Secretary of the Interior, or shall pay to the United States Indian Superintendent, Union Agency Muskogee,

Oklahoma, for the use and benefit of the lessor, for each whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other considerations named herein, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender this lease by executing and recording a proper release thereof and otherwise complying with paragraph numbered 7 hereof on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year, and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen days after it becomes due at the end of any yearly period, during which a well has not been completed, as provided herein, shall be a violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation of such lease under paragraph numbered 9 hereof; but such cancellation shall not in anywise operate to release or relieve the lessee from the covenant and obligation to pay such rental, or any other accrued obligation. The lessee may be required by the Secretary of the Interior, or by such officer as may be designated by him for the purpose, to drill and operate wells to offset wells on adjoining tracts, and within three hundred feet of the dividing line, or in case of gas wells, lessee may have the option, in lieu of drilling offset wells, of paying a sum equal to the royalties which would accrue on each well to be offset if said wells had been drilled and were being operated on the land described herein and in accordance with the terms hereof. It is understood and agreed by the parties hereto that offset wells shall be drilled, or royalties paid in lieu of drilling, within ten days after the lessee is notified to do so, and failure to comply with such requirement shall constitute a violation of one of the substantial terms of this lease.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed on the portions in his occupancy or use, take good care of the same and promptly surrender and return the premises upon the termination of this lease to lessor or to whom-
53 soever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove therefrom any buildings or permanent improvements erected thereon during the said terms by the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for said lease, excepting the tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, and machinery, and the casing of all dry or exhausted wells which shall remain the property of the lessee and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit

any nuisance to be maintained on the premises under lessee's control, nor allow any intoxicating liquors to be sold or given away for any purpose on such premises; shall not use such premises for any other purposes than those authorized in the lease; and before abandoning any well shall securely plug the same so as effectually to shut off all water from the oil-bearing stratum, or in the manner required by the laws of the State of Oklahoma.

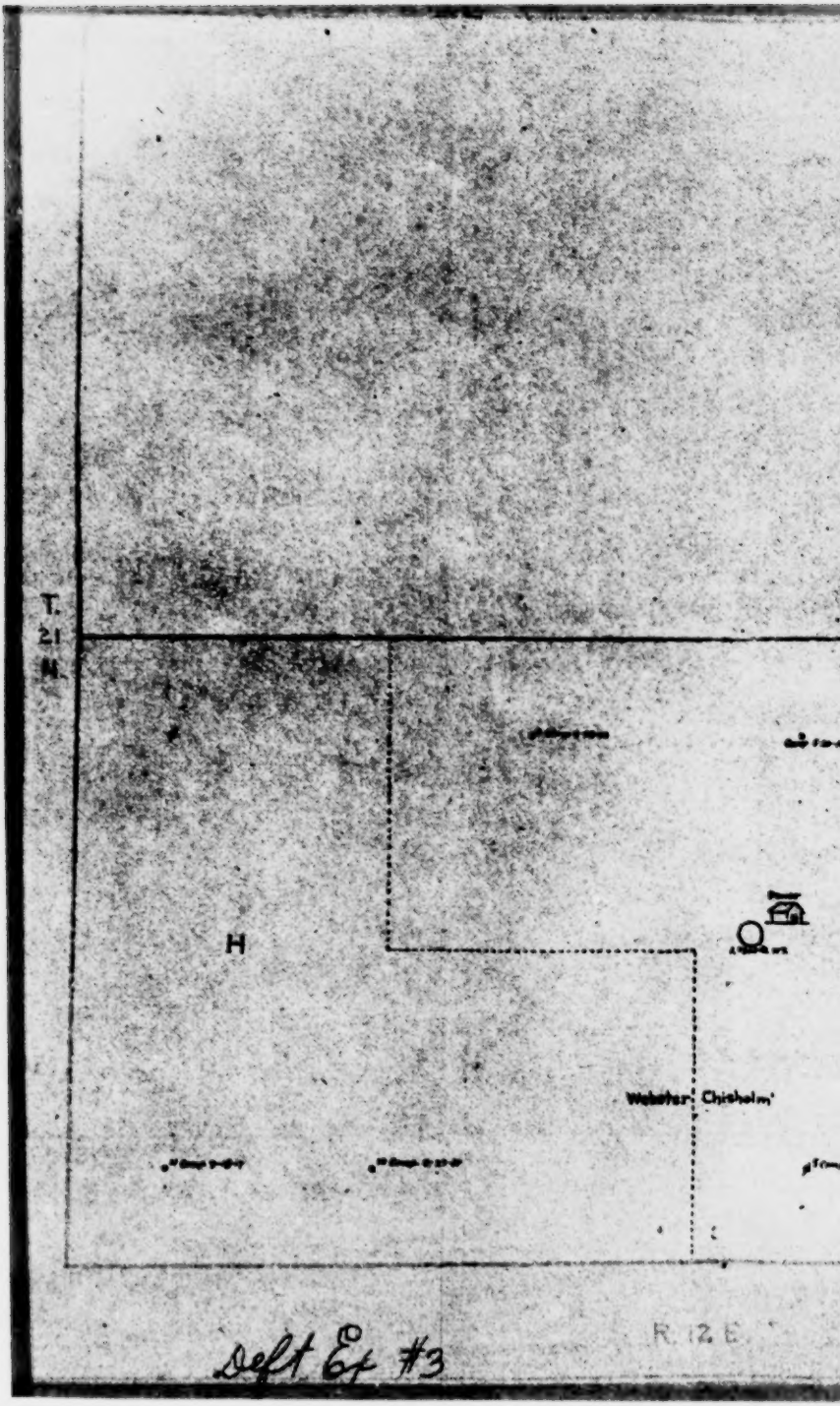
6. The lessee shall keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property and upon all the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may at any time, by paying to the Indian Superintendent, all amounts then due as provided herein and the further sum of one dollar surrender and cancel this lease and be relieved from all further obligation or liability thereunder; Provided, if this lease has been recorded lessee shall execute a release and record the same in the proper county recording office; Provided, further, in event restrictions are removed from all leased premises, the lessee may surrender all the undeveloped portion thereof, by paying the lessor all amounts then due and the further sum of one dollar, which surrender shall not affect the terms hereof as to each producing well and ten acres of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells and execute and record a cancellation of premises surrendered.

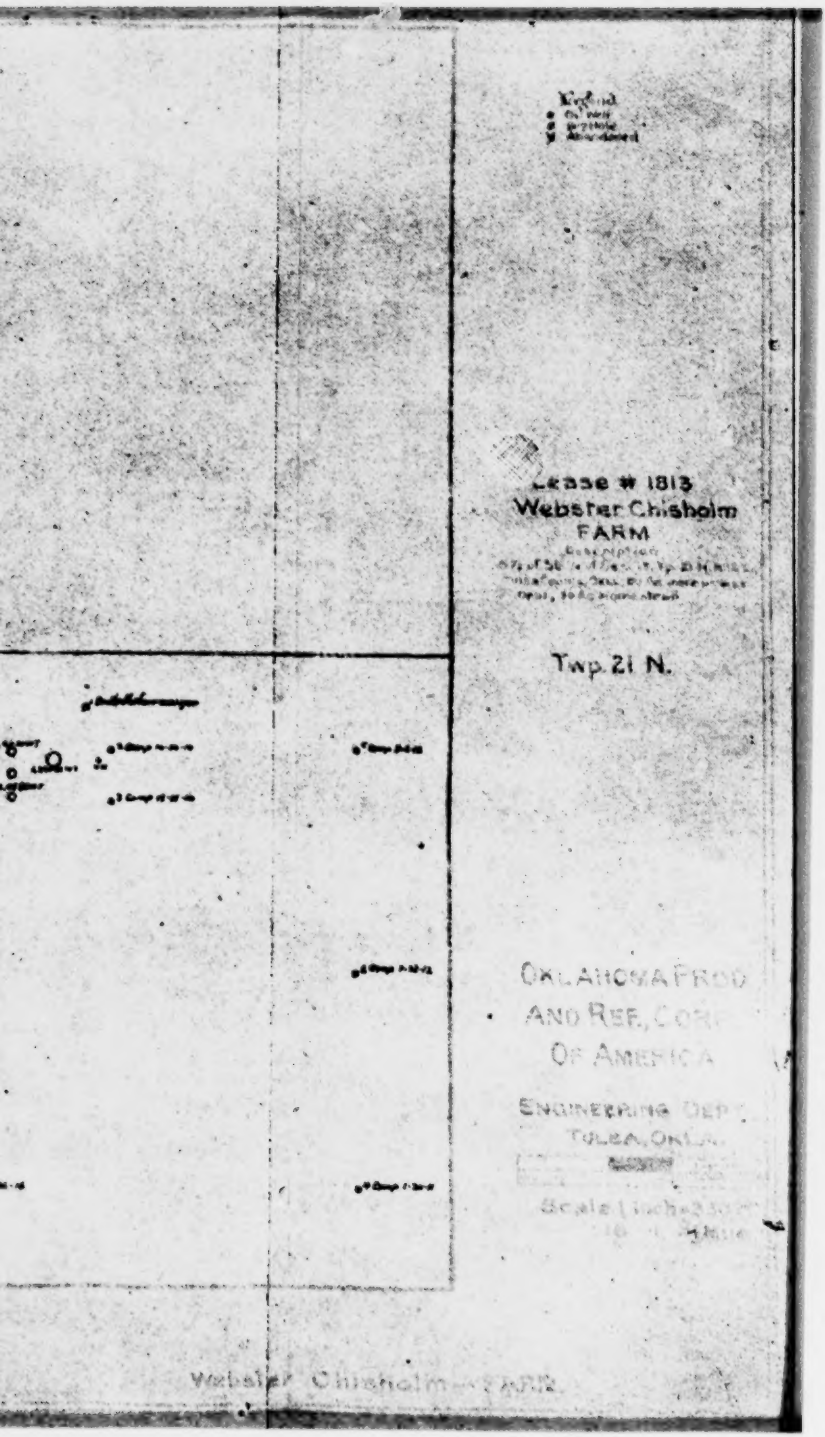
8. This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease; Provided, however, that no regulations made after the approval of this lease, affecting either the length or term of oil or gas leases,
54 the rate of royalty or payment thereunder, or the assignment of leases, shall operate to affect the terms and conditions of this lease.

9. Upon the violation of any of the substantial terms and conditions of this lease the Secretary of the Interior (or lessor, in event restrictions are removed as provided in paragraph 12 hereof) shall have the right, at any time after thirty days' notice to the lessee specifying the terms or conditions violated, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

10. Before this lease shall be in force and effect lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, and such further bond or bonds as may be required by said Secretary, conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian Office.



Dept Ex #3


Lease # 1813
Webster Chisholm
FARM
Twp. 21 N.
OKLAHOMA PROD
AND REF. CORP
OF AMERICA
ENGINEERING DEPT
TULSA, OKLA.
Webster Chisholm FARM

11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such lease under the rules and regulations, and furnish bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of the covenants and conditions of this lease.

12. In event restrictions on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to the United States Indian Superintendent shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor or his assigns at the —— bank of ——, or at such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, and lawful assigns of the parties hereto.

14. In witness whereof, the parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

(Signatures and acknowledgments follow.)

Office of Superintendent for Five Civilized Tribes,

Muskogee, Okla.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and complete copy of oil and gas mining lease and stipulation modifying term of lease.

(Signed) GABE E. PARKER, [SEAL.]
Superintendent for the Five Civilized Tribes.

Jan. 13, 1921.

(DEFENDANTS' EXHIBIT No. 3.)

(See insert for photographic reproduction of plat of Indian homestead.)

(Here follows insert, marked page 54½.)

(*Portions of Regulations Introduced in Evidence by Defendants.*)

"42*a*. On and after January 1, 1908, all leases of any description whatever executed by an allottee of the Five Civilized Tribes on land from all of which the restrictions against alienation had been removed before such execution, may be executed without any provision for reference to or supervision by the Secretary of the Interior or any official of the Department of the Interior; and the Indian agent shall refuse to accept for consideration any lease executed after January 1, 1908, covering land from all of which restrictions had been removed before such execution.

b. All leases executed and approved heretofore or hereafter on land from all of which restrictions against alienation have been or shall be removed, even if such leases contain provisions authorizing supervision by this Department, shall, after such removal of restrictions against alienation, be operated entirely free from such supervision, and the authority and power delegated to the Secretary of the Interior in said leases shall cease, and all payments required to be made to the United States Indian agent shall thereafter be made to lessor or the then owner of said land, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to such leased land from which said restrictions are removed, except where a bond is required in said lease it shall be furnished with responsible surety, unless the giving of said bond is waived by lessor or the owner of the land. (Amended August 12, 1908. See p. 30.)

d. In event restrictions are removed from a part of the
56 land included in a lease for oil, gas, or other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior, and all royalties thereunder shall be paid to the Indian agent until such time as the lessor and lessee shall furnish the Secretary of the Interior satisfactory information that adequate arrangements have been made to account for the oil, gas, or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulations provided.

23. * * *

Appropriate changes will be made in the lease form to provide for and carry into effect the provisions of the above modified regulations and such modifications of the regulations and lease form shall be effective May 1, 1911, and may, at the option of the parties, be incorporated in leases hereafter executed prior to that date. Said modified provisions may also be substituted in any lease, executed prior to said date on forms now or heretofore in use, in lieu of corresponding provisions contained in such leases, upon formal stipulations by the parties to that effect, when duly approved by the

Secretary of the Interior. All leases which embrace the said provisions, whether in original form or by substitution, shall be subject to these regulations.

These regulations shall not be construed as intended to affect existing leases, except where such leases are modified by stipulation, as provided herein or where such leases are susceptible of modification in these respects by regulation."

And the Rules and Regulations of the Interior Department filed July 16, 1921, were introduced by the defendants and considered as a part of the evidence by the court.

2596. Eq.

Rules and Reg. Int. Dept.

Department of the Interior,

Office of Indian Affairs.

Washington, June 9, 1921.

I, Chas. H. Burke, Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true copy of the original as the same appears of record in this Office.

57 In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of this Office to be affixed on the day and year first above written.

[SEAL.] CHAS. H. BURKE,
Commissioner.

Regulations Governing Leasing of Lands and Removal of Restrictions of Members of the Five Civilized Tribes.

Prescribed by the Secretary of the Interior for the Purpose of Carrying Into Effect the Provisions of the Agreement with the Creek and Cherokee Nations and the Acts of Congress Approved April 26, 1906 (34 Stat. L. 137), and May 27, 1908 (35 Stat. L., 312)

Reprinted June 1, 1916.

NOTE.—The following Department instructions relative to signature of Indians who can not write apply to Departmental leases and accompanying papers and must be carefully followed:

Hereafter any Indian who can not write his name will be required to sign all official papers by making a distinct imprint of the right thumb (of the left, in case of loss of right), in lieu of cross mark.

Such signatures must be witnesses by two persons, one of whom must be a United States Government employe (such as Field Clerk, Postmaster, United States Commissioner, etc.)

When possible, lessees are requested to take the lessor to the nearest District Agent and have execution of lease supervised by Field Clerk's office.

Leasing.

April 20, 1908.

To carry out the provisions of existing law as quoted herein the following regulations governing the leasing of lands of members of the Five Civilized Tribes are hereby prescribed. All former regulations for this purpose are replaced and superseded by these regulations.

Acts Affecting Leases.

Cherokee Agreement.

[Section 72 of the Act of Congress Approved July 1, 1902 (32 Stat. L., 716).]

Cherokee citizens may rent their allotments when selected
58 for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.

Creek Agreement.

[Section 17 of the Act of Congress Approved June 30, 1902 (32 Stat. L., 500).]

Section 37 of the agreement ratified by said act of March 1, 1901, is amended, and as so amended is re-enacted to read as follows:

Creek citizens may rent their allotments, for strictly nonmineral purposes, for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, and leases for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.

Legislation for Full-blood Allottees.

[Act of Congress Approved April 26, 1906 (32 Stat. L. 137).]

Sec. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to the expiration of said period, be removed by act of Congress and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before or for the making of which a contract of agreement was entered into before the removal of restrictions be, and the same is hereby, declared void: Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

Sec. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper court: Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

[Sections 2, 3, and 11 of the Act Approved May 27, 1908 (35 Stat. L., p. 312).]

Sec. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor
60 or incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And provided further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

Sec. 3. That the rolls of citizenship and of freedmen of the Five Civilized Tribes, approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedmen of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

That no oil, gas, or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior as if this Act had not been passed: Provided, That the owner or owners of any allotted land from which restrictions are removed by this act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas, or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing canceling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, and the same shall be recorded in the county where the land is situate.

Sec. 11. That all royalties arising on and after July first, nineteen hundred and eight, from mineral leases of allotted Seminole
61 lands theretofore or hereafter made, which are subject to the provisions of the Secretary of the Interior, shall be paid to

the United States Indian Agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: Provided, That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, nineteen hundred and eight.

Oil and Gas and Other Mineral Leases.

How to Procure Approval of a Lease.

1. Oil and gas and other mineral leases requiring the approval of the Secretary of the Interior shall be made for a period of five (now ten) years from the date of the approval thereof by the Secretary of the Interior and as much longer thereafter as oil, gas, or other material is found in paying quantities; all leases shall be executed upon forms prescribed herein (procure blanks from Superintendent Union Agency). See Sec. 1 of amendments of Feb. 6, 1911, p. 32.

2. All leases shall be in quadruplicate, and with the papers required, shall be filed within thirty days from and after the date of execution by the lessor with the United States Indian Agent at Union Agency, Muskogee, Okla. (See Amend. May 12, 1913, p. 39.)

3. The act of Congress approved March 1, 1907 (35 Stat. L., 1015), provides:
The filing heretofore or hereafter of any lease in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice.

4. Allottees are permitted to execute leases after formal application for allotment has been accepted.

5. No person, firm, or corporation will be allowed to lease, within the territory occupied by the Five Civilized Tribes, for the purpose of producing oil or gas, more than 4,800 acres of land in the aggregate.

6. Oil and gas leases shall be accompanied, when filed, with application, made under oath, on blank prescribed, Form B; leases for other mineral purposes shall be accompanied by application on Form L. These applications shall state specifically with what other persons, firms, or corporations the lessee is interested, either directly or indirectly, in oil or gas or other mineral leases of lands in the Five Civilized Tribes. The Department in every case reserves the
62 right at any time to make further inquiry as to the standing and business ability of any prospective lessee.

7. Where the lessee is a corporation, its first application must be accompanied by a sworn statement of its proper officer, showing:

The total number of shares of the capital stock actually issued an specifically the amount of cash paid into the treasury on each sha sold; or, if paid in property, state kind, quantity, and value of th same paid per share.

Of the stock sold how much per share remains unpaid and subje to assessment.

How much cash the company has in its treasury and elsewher and from what sources it was received.

What property, exclusive of cash, is owned by the company, an its value.

What the total indebtedness of the company is, and specifically th nature of its obligations.

Subsequent applications of corporations should show briefly th aggregate amount of assets and liabilities.

8. Corporations, with their first application, shall file one certifie copy of articles of incorporation, and, if a foreign corporation, evi dence showing compliance with local corporation laws; also a lis showing officers and stockholders, with postoffice addresses and num ber of shares held by each. Statements of any changes of officer or any changes or additions of stockholders shall be furnished to th Indian agent on January 1 of each year, and at any other time whe requested; affidavits may be required of individual stockholders set ting forth in what companies or with what persons or firms they ar interested in oil or gas mining leases or lands in the Five Civilized Tribes, and whether they hold such stock for themselves on in trust. Evidence shall also be given—in a single affidavit (see Form E)— by the secretary of the company, or by the president, showing author ity of officers to execute lease, bond, and other papers.

9. Where lessor is a minor there must be filed—

Certified copy of letters of guardianship.

Certified copies of court orders authorizing and confirming lease.

Proof of age of minor, preferably affidavit of parent or parents. (Note: Sec. 3 of Act of May 27, 1908 (p. 4), now makes enroll ment records conclusive evidence as to age and quantum of Indian blood, therefore affidavits not longer required.)

63 10. Lessee must procure and file with each lease an affidavit of the Indian lessor, made before a United States commis sioner, Indian agent, county or district judge, Federal judge or clerk of a Federal court, showing that lease was understood by the lessor, and what, if any, the bonus agreements are, etc. (See Form D pre scribed, which also covers lessee's affidavit of bonus no development, amended by Sec. 14, Regulations of June 20, 1908, p. 25.) Note: The Superintendent of Union Agency by Departmental order of July 1, 1907, is required to investigate and report upon the adequacy of bonus paid for each lease.

11. Except to prevent loss or waste, leases of undivided inherited lands will be approved only in cases where all the heirs join in the lease, and must be accompanied by satisfactory proof that the lessors are the only heirs of the deceased allottee. Minor heirs can lease or

join adult heirs in leasing only through guardians under order of court. Proof of heirship shall be given upon Form F, prescribed. (See Amend. June 18, 1915, p. 43.)

If probate or other court proceedings have established the heirship in any case, or the land has been partitioned, certified copy of final order, judgment, or decree of the court will be accepted in lieu of Form F, mentioned above.

12. Lessees are required to furnish with each oil or gas lease, to be filed at the time the lease is presented, a bond upon Form C, with two or more sureties, or with a surety company duly authorized to execute bonds. Such bond shall be in amount as follows: For leases covering 40 acres and less than 80, $1,000; for those covering 80 acres and less than 120, $1,500; for those covering 120 acres and not more than 160 acres, $2,000; and for each 40-acre tract or fractional part thereof above 160 acres an additional amount of $500: Provided, however, That a lessee shall be allowed to file one bond, Form II—series 1908, covering all leases to which they are or may become parties instead of a separate bond in each case, said bond to be in the penal sum of $15,000, covering all such leases to which they now are or may hereafter become parties, in lieu of the separate bond as above prescribed.

The right is specifically reserved to increase the amount of any such bond above the sum named in any particular case where the Secretary of the Interior deems it proper to do so. Bonds covering other mineral leases shall be in such sum as may be fixed by the Secretary of the Interior. (See Amend. Nov. 20, 1915, p. 43.)

13. The Indian agent at Union Agency, or other Government officer having the matter in charge or under investigation, may, at any time, either before or after approval of a lease, call for and secure any additional information desired to carry out the purpose of these regulations, and such information shall be furnished within the time specified in the request therefor.

64

14. When a lessee fails to furnish, within the time specified, papers necessary to put his lease and bond in proper form for consideration, the Indian agent at the Union Agency is directed to forward such lease immediately for disapproval.

Royalties.

15. *a.* The minimum rate of royalties on oil on and after May 1, 1908, shall be 12½ per cent of the gross proceeds of the oil produced from leased premises, and payment shall be made at the time of sale or removal of oil.

b. Any lease approved, delivered, or assigned since October 14, 1907, wherein the royalty on oil is less than 12½ per cent, may, with the approval of the Secretary of the Interior, be subject to all rights, privileges, conditions, and terms of the lease form approved and issued by the Secretary of the Interior April 20, 1908, the same as if written therein at length, and any of the terms and conditions

in said executed lease in conflict with the terms and conditions of said lease form of April 20, 1908, will be revoked and canceled, on and in consideration that owner of said lease stipulate in writing to increase the royalty on oil therein to 12½ per cent of the gross proceeds (Procure form of stipulation from Superintendent, Union Agency.)

c. If the owner of any lease mentioned above in *b* shall fail to stipulate in writing for the increase of royalty to 12½ per cent, the rate of royalty for said lease shall, on and after May 1, 1908, be 12½ per cent, and said lease shall be free from any further increase in the rate of royalty on oil, but shall not have the rights, privileges, conditions, and terms of the lease form approved and issued by the Secretary of the Interior April 20, 1908, until said stipulation is filed.

d. If the owner of a lease delivered prior to October 14, 1907, wherein the royalty on oil is less than 12½ per cent, stipulates in writing within eight years from the date of said lease to increase the royalty on oil for said lease to 12½ per cent, and shall show that he has notified the lessor in writing, said lease shall thereafter have all the rights, privileges, conditions, and terms of the lease form approved and issued April 20, 1908, the same as if written therein at length, and any of the terms and conditions of said lease as originally executed in conflict with the terms and conditions of said lease form of April 20, 1908, wil thereby be revoked and canceled.

65 *e.* In all cases notice in writing must be given by owner of lease to owner of leased land of intention to increase royalty on oil and, in consideration thereof, obtain the benefits of the lease form approved by the Secretary of the Interior April 20, 1908, and stipulation of owner of lease agreeing to increase of royalty on oil must be filed with the Secretary of the Interior on or before eight years from date of execution of lease.

f. Any lease heretofore approved, wherein the royalty on oil is 12½ per cent or more, may, on terms and conditions to be approved by the Secretary of the Interior, at any time within eight years from date of the lease, and before removal of restrictions, be made subject to the terms, conditions, rights, and privileges of the lease form approved by the Secretary of the Interior April 20, 1908, as though the terms of said lease form were written in and made part of such lease.

16. From and after July 1, 1907, the royalty on gas-producing wells, irrespective of whether the leases were heretofore or shall hereafter be approved, shall be as follows:

Where the capacity of a well is tested at 3,000,000 cubic feet or less per day of twenty-four hours, $150 per annum in advance, and where the capacity is more than 3,000,000 cubic feet per day, $50 for each additional 1,000,000 cubic feet or major fraction thereof. (Changed to flat rate. See amended regulations of Feb. 6, 1911, p. 32.)

The capacity of wells shall be determined, under the supervision of the Secretary of the Interior, before utilized and annually thereafter (now semi-annually under leases on old form providing graduated scale gas royalty as per Departmental order of Sept. 2, 1909), the amount of royalty to be based on such determination.

Where the lessee desires to retain the gas-producing privilege of any well, but not to utilize the gas for commercial purposes, he shall pay an annual rental of $50 (now $100.00. See amended regulations of Feb. 6, 1911, p. 32) in advance, beginning from the date of discovery of gas, and to be paid within thirty days therefrom.

Except in cases of emergency, which shall not exceed ten days, not more than 75 per cent of the capacity of any gas well shall be utilized.

Evidence of date of discovery of gas wells and the beginning of utilization must be properly furnished in the form of a sworn statement.

Where wells produce both oil and gas, or gas alone in limited quantities, or gas in any quantity from a stratum which also produces oil or salt water to such an extent that the gas is unfit
66 for domestic purposes, lessee may dispose of such gas at the following minimum rates:

For drilling, 5 cents per foot of drilling done, or a flat rate of $5 per day.

For pumping, $1 per month for each well pumped.

For other purposes, 1 cent per thousand cubic feet, measured through standard meter.

For gas thus disposed of lessee will pay monthly, in the same manner as other royalties are paid, supported by sworn statements, such percentage of the gross proceeds received from the sale of gas as is paid under the same lease for royalty on oil.

17. The royalty on coal shall not be less than 8 cents per ton of 2,000 pounds on mine run, or coal as it is taken from the mines, including what is commonly called "slack."

18. The royalty on asphaltum shall not be less than 10 cents per ton of 2,000 pounds on crude asphalt, or 60 cents per ton on refined asphalt.

19. Application for leasing of gold, silver, iron, shale, limestone, or other mineral not specified in these regulations may be submitted, and the royalty thereon shall be fixed after a special investigation in each particular case by the Secretary of the Interior.

20. All royalties, rents, or payments due under leases which have been or may be approved by the Secretary of the Interior shall be paid to the United States Indian Agent at Union Agency, Muskogee, Okla., or to such other person as may be designated by the Secretary of the Interior, for the benefit of the various lessors; or, in cases of minors and incompetents, shall be deposited as hereinafter specified. (See amendment of July 23, 1910, as to minors and incompetents, p. 31.) No royalties on such leases shall be paid by the lessee direct to the lessors or their representatives.

All remittances to the United States Indian agent at Union Agency shall be made in New York, Chicago, or St. Louis exchange, except that where the same can not be procured, post-office or express money order will be accepted. (Note: Make all remittances payable to Cashier Union Agency.)

Royalty on oil, coal, or other mineral produced in each month (except yearly payments on gas wells as herein mentioned) shall be paid on or before the 25th day of the month next succeeding.

67 21. With the consent of the United States Indian agent, lessees may make arrangements with the purchasers of oil for the payment of the royalty to the United States Indian Agent by such purchasers, but such arrangement, if made, shall not operate to relieve lessees from the responsibility for the payment of the royalty, should such purchaser fail, neglect, or refuse to pay the royalty when it becomes due.

Where lessees avail themselves of this privilege, division orders, permitting the pipe-line companies or other purchasers of the oil to withhold the royalty interest, shall be executed and forwarded to the Indian agent for approval before wells are brought in, as pipe-line companies are not permitted to accept or run oil from Indian leases until after the approval of division orders showing that the lessee has a lease regularly approved and in effect.

22. In oil and gas leases until a producing well is completed on leased premises and in all other mineral leases advance royalty shall be paid annually in advance from the date of the lease (now date of approval of lease applies to leases drawn on forms adopted by regulations of April 20, 1908, also subsequent amendments to said regulations), as follows: 15 cents per acre per annum for the first and second years; 30 cents per acre per annum for the third and fourth years; 75 cents per acre for the fifth year (now $1.00 per acre per annum after the fifth year); and in the case of mineral leases other than for oil and gas, 75 cents per acre annually thereafter; the sums thus paid to be credited on the stipulated royalties. (See amended regulations of Feb. 6, 1911, p. 32, and June 29, 1911, p. 34.)

The advance royalty for the first year shall be tendered at the time of the filing of the lease in the office of the United States Indian agent at Union Agency.

On all mineral leases other than for oil and gas, when the annual advance royalty becomes due on a leased tract from which minerals are being produced, the lessee will not be required to pay the advance royalty until the royalty on production during the month within which the advance royalty falls due is accounted for; and if royalty on production equals or exceeds the advance royalty, it will be accepted as covering both items, but if it does not equal the advance royalty due, the lessee shall include the difference with his payment on production.

23. An oil or gas lessee shall drill at least one well on leasehold within twelve months from the date of the approval of the lease by

the Secretary of the Interior, or may delay drilling said well
68 for not exceeding five years (now ten years) from the date of such approval by paying to the United States Indian agent, Union Agency, Muskogee, Okla., for the use and benefit of lessor (subject to the limitations and conditions in said lease contained), in addition to said advance royalty the sum of $1 per acre, per annum, for each year the completion of such well is delayed, payable on or before the end of each year. The lessee may be required to drill and operate wells to offset paying wells on adjoining tracts and within 300 feet of the dividing line. (See amendments to regulations of Feb. 6, 1911 (p. 32) and June 29, 1911 (p. 34).)

24. Sworn reports accompanying each royalty remittance shall be made by each lessee within twenty-five days from the close of each month for the month preceding, covering all operations, whether there has been production or not, except that where division orders have been approved and the royalty paid by the pipe-line company or other purchaser of oil, lessees need not make monthly reports direct.

A lessee may include within one sworn statement all leases upon which there is no production or upon which dry holes have been drilled.

Quarterly reports, whether or not oil royalty is paid by pipe-line company or other purchaser, shall be made by each lessee within twenty-five days after December 31, March 31, June 30, and September 30 of each year, upon forms provided, showing manner of operations and total production during such quarter.

Sworn reports of gas wells shall be made both when discovered and when utilized.

25. All royalties, rents, or payments accruing under any lease made for or on behalf of any minor or incompetent shall be deposited by the Indian agent or other Government officer to whom said, to the credit of the guardian or curator of such minor or incompetent, in some national bank or banks designated by the Commissioner of Indian Affairs, and may be withdraw- therefrom by such guardian or curator, with the consent of the United States Indian agent, in sums not exceeding $50 per month unless otherwise ordered by the court. Sums in excess of $50 per month may be withdrawn on order of the proper court and not otherwise. Such designated banks shall furnish satisfactory surety bonds to be approved by the Secretary of the Interior, guaranteeing the safe care and custody of the funds so deposited. (Amended July 23, 1910. See p. 31.) (Amended Nov. 29, 1912. See p. 38.)

) Operations (Superseded by Regulations Approved Oct. 20, 1915, p. 44-51.)

26. Operations upon land covered by any lease requiring the approval of the Secretary of the Interior are not permitted until after such lease is regularly approved, delivered and official notice thereof given. (See Amend. May 12, 1913, p. 39.)

27. Lessees shall not be allowed to drill within 200 feet of the division lines between lands covered by their leases and adjoining lands, except in cases where wells on adjoining tracts are drilled at a less distance, in which case lessees may offset such wells by drilling at an equal distance from the line; and provided further, that in cases where the dimensions of leased tracts do not permit drilling 200 feet from the lines, wells may be drilled at points halfway between lines which are 400 feet or less apart.

28. Lessees shall agree to allow the lessors and their agents, or any authorized representative of the Interior Department, to enter, from time to time, upon and into all parts of the leased premises for the purposes of inspection, and shall further agree to keep a full and correct account of all operations and make reports thereof, as herein required, and their books and records showing manner of operations and persons interested shall be open at all times for the examination of such officers of the Department as shall be instructed in writing by the Secretary of the Interior to make such examination.

29. Lessees or operators using natural gas for outside illumination, or in connection with operations carried on under approved oil and gas leases covering lands within the territory of the Five Civilized Tribes, are required to use the device known as a "Storm burner," or other burner consuming not more than 15 cubic feet of gas per hour. Such lamps shall not be lighted earlier than 5 o'clock in the afternoon and shall be extinguished not later than 8 o'clock each morning, and not more than four such lights shall be used in drilling one well. Stopcocks shall be placed on all pipes used for conveying gas to burning devices of any character, and the gas shall be shut off at all times when not in use. Boilers using gas for fuel shall have smokestacks or chimneys not less than 12 feet in height.

30. Operators upon approved leases within the territory of the Five Civilized Tribes are required to use all possible diligence to prevent any unnecessary waste of natural gas. Operators in possession of any gas well shall, within five days after gas-bearing sand or rock is penetrated, shut in and confine such gas in the well except so much of the product as can be utilized. Lessees or operators
70 shall pay to the United States Indian Agent at Union Agency, Muskogee, Okla., the sum of $10 per day for each well during the time such well or wells are allowed to go uncontrolled or uncared for, unavoidable accidents excepted, and a failure on the part of the lessees or operators to prevent a waste of gas will further subject the lease to cancellation by the Secretary of the Interior after due notice. (See Amendment May 12, 1913, p. 39.)

In cases where oil-bearing strata are found at a greater depth than gas bearing sand, packers and two strings of casing shall be used, so that waste of the gas from the first sand shall be prevented, thereby securely shutting in and preserving the gas.

31. A lessee producing crude oil or natural gas within the territory of the Five Civilized Tribes shall at time of abandoning a well securely plug the same so as to effectually shut off all water from the

oil-bearing stratum, or in the manner required by the laws of the State of Oklahoma. Upon the abandonment of a well in which no oil or gas bearing stratum is encountered, lessee shall fill the bottom of the hole solidly for at least 25 feet with sand pumpings, gravel, and pulverized rock; immediately on top of such filling shall be seated a dried pine plug of not less than 2 feet in length and of a diameter of not less than one-fourth inch less than the inside diameter of the casing; upon this plug another filing of at least 25 feet of sand pumpings or other mineral substance shall be made, upon which there shall be seated a dried pine plug, and the well again filled for at least 25 feet with similar filling material; after the casing has been drawn from such well there shall be immediately seated at the point where such casing was seated a cast-iron ball, or tapered wooden plug at least 2 feet in length, the diameter of which ball or the top of which plug shall be greater than that of the hole below the point where such casing was seated, and above such ball or plug such well shall be solidly filled with the aforesaid filling material for a distance of at least 50 feet; and the hole shall then be closed or marked. Or such abandoned well may be plugged in the manner required by the laws of the State of Oklahoma. Every lessee or operator shall pay to the United States Indian agent, Union Agency, Muskogee, Okla., for the use and benefit of lessor, the sum of $10 per day for each well drilled during the time such well remains uncapped or unplugged as herein provided.

32. Lessees shall provide proper tankage, or (of) suitable shape for accurate measurement, into which all production of crude oil shall be conducted direct from wells through pipes or other closed connections. Where a lease covers a homestead and surplus lands and such surplus lands are sold, separate tankage must be supplied for the homestead tracts and oil extracted therefrom reported separately. If the contents of such tanks are disposed of in any manner other than to a purchaser to whom a division order has been approved, or removed from the leased premises, accurate measurement shall first be made and the production reported and royalty thereon paid to the United States Indian agent in the usual manner.

In cases of emergency, where the capacity of new wells is such that lessees are unable immediately to provide proper tankage, production may be conducted to open ponds, or earthen tanks, but in no case shall any embankment exceed 15 feet in height. Such ponds or tanks shall be so constructed as to minimize the danger of overflow or collapse, or damage to crops or adjacent property.

Crude oil run into earthen tanks in cases of emergency, as indicated above, shall not be allowed to remain in such earthen tankage for a longer period than fifteen days, except that where lessees desire to so store their oil, and after it has been properly gauged and royalty paid thereon, such tankage may be used when so constructed as to remove all reasonable danger of fire, overflow, and damage to other property. The right is reserved to supervise the construction of earthen tanks where deemed necessary.

Oil to be temporarily held or stored in earthen tankage must be run from the wells into receiving tanks capable of accurate measurement, and then gauged before being turned into earthen tankage.

33. Oil shall not be sold to a pipe-line company until a division order is filed as hereinbefore provided. Should the lessee desire to sell oil or remove it from the leased premises in any other manner, such sale or removal shall not be made until authorized by the Indian agent. Lessee or his representative shall actually be present when oil taken under division orders is run by pipe-line companies, and lessee shall be responsible for the correct measurement and report of oil so run; otherwise, the approval of division order may be revoked.

34. Whenever operators desire to secure from allotted lands timber for rigs, transmission of power, foundations, or for any other purpose, they must first obtain the consent of the allottee and properly compensate the owner of the timber therefor.

35. Lessees shall keep a true and correct copy of each well drilled, including a complete log made at the time of drilling, and, whenever requested by properly authorized officers of the Interior Department, shall furnish a copy of such record and log, duly certified.

36. Lessees are required, when so requested, to file a plat of their leases showing exact locations of all producing oil or gas
72 wells, dry wells, proposed locations, tanks, power houses, pumping stations, etc. Such plats, when desired, should also show locations of dry or producing wells upon adjoining tracts, so far as known to lessee.

37. Lessees are not permitted to locate either tanks or wells within 200 feet of any building used as a dwelling, granary, or shelter for stock, except where actually necessary to offset wells upon adjoining tracts.

38. All "B. S." or refuse from tanks or wells shall be drained off into proper receptacles, at a safe distance from the tanks, wells, or buildings, to the end that it may be disposed of by being burned or transported from the premises; but in no case shall it be permitted to flow over the surface of the land to the injury of any surrounding property or to the pollution of any stream. Salt water or any other product from any oil or gas well, not marketable, shall not be permitted to run into any tanks or pools used for watering stock.

Assignments.

39. *a.* No lease or any interest therein, by working or drilling contract or otherwise, or the use of such lease, shall be sublet, assigned, or transferred, directly or indirectly, without the consent of the Secretary of the Interior; and if at any time the Secretary of the Interior is satisfied that the provisions of any lease, or that any of the regulations heretofore or that may be hereafter prescribed

have been violated, he reserves authority to terminate the lease in the manner therein provided, and the lessor shall then be entitled to take immediate possession of the land.

b. All leases hereafter approved, or any interest therein, may be assigned or transferred with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the existing rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of the covenants and conditions of said lease. (Modified by Departmental orders of May 14, 1909, and July 2, 1910, which provide for the approval of assignments, subject to the specific condition that the price basis for the computation of oil royalties must be determined by the Secretary of the Interior.)

c. In all leases heretofore approved where the royalty on oil is now less than 12½ per cent, if the lessee at any time within eight years from the date of the lease shall consent to increase said royalty on oil to 12½ per cent of the gross proceeds, said lease shall thereafter be subject to and have all the rights, privileges, and terms in the lease form approved by the Secretary of the Interior April 20, 1908, and be assignable as provided in *b* hereof.

d. If the present owner of a lease heretofore approved, in which the royalty on oil is less than 12½ per cent, will not stipulate to increase such royalty to 12½ per cent of the gross proceeds produced, and the owner of said lease should hereafter desire to transfer or assign the same, then said owner shall make application to the Indian agent, stating the reasons for the proposed assignment, and when such application is approved by said agent, formal assignment papers in quadruplicate may be entered into and filed with the Indian agent for transmission to the Secretary of the Interior. The acceptance by the proposed assignee and consent of the surety company shall be filed on the form prescribed herein, "G." Financial showing and other papers as required from an original lessee must be furnished by the assignee, and the parts of the lease distributed to the lessee and lessor shall be returned for endorsement. No assignment under this regulation (39*d*) shall be allowed without notice first having been given to the lessor of the application to assign.

Cancellations.

40. Where a lessee makes an application for the cancellation of an approved lease, all royalties or rentals due up to the date of the application for cancellation must be paid before such application will be considered, and the parts of the lease delivered to the lessor and lessee should be surrendered. (Amended by Departmental order of January 11, 1909, which provides that the lessee and surety will be held for payment of all royalties and rentals due to the date of completion of application for cancellation, which, if the

lease has been recorded, also includes filing of a properly executed and recorded release of record, and payment to Superintendent Union Agency $1.00 cancellation fee if lease so stipulates.)

NOTE.—For proper method of terminating Departmental leases covering lands now *un*restricted, see also Sec. 3, Act of Congress of May 27, 1908, (35 Stat. L., 312).

Forms.

41. Applications, leases, and other papers must be upon forms prepared by the Department, and upon application the Indian agent at Muskogee, Okla., will furnish prospective lessees with such forms at a cost of $1.00 per set.

74 Set 1.

Form A. Oil and gas lease.
Form B. Application for oil and gas lease, including financial showing.
Form C. Bond.
Form D. Affidavit of Indian lessor, proof of bonus, etc.
Form E. Authority of officers to execute papers.
Form F. Proof of heirship.
Form G. Assignment.
Form H. $15,000 bond.
Form I. Stipulation increasing oil royalty and extending term of lease.
Form J. Stipulation increasing oil royalty, extending term of lease, and rescinding regulations of October 14, 1907.
Form K. Lessor's consent to extension of term of lease.

Set 2.

Form L. Application for mineral lease, other than oil and gas.
Form M. Coal and asphalt lease.
Form N. Lease for minerals, other than oil and gas or coal and asphalt.
Form O. Agriculture lease.
Form P. Grazing lease.
Form Q. Affidavit of personal surety to accompany bond.

Lands from which Restrictions Have Been or May Be Removed.

42. *a.* On and after January 1, 1908, all leases of any description whatever executed by an allottee of the Five Civilized Tribes on land from all of which the restrictions against alienation had been removed before such execution, may be executed without any provision for reference to or supervision by the Secretary of the Interior or any official of the Department of the Interior; and the Indian Agent shall refuse to accept for consideration any lease executed after January 1, 1908, covering land from all of which restrictions had been removed before such execution.

b. All leases executed before the removal of restrictions against alienation, on land from all of which restrictions against alienation shall be removed after such execution, if such leases contain specific provision for approval by the Secretary of the Interior, whether now filed with the Department or presented for consideration hereafter, will be considered and acted upon by this Department as heretofore.

75 *c.* All leases executed and approved heretofore or hereafter on land from all of which restrictions against alienation have been or shall be removed, even if such leases contain provisions authorizing supervision by this Department, shall, after such removal of restrictions against alienation, be operated entirely free from such supervision, and the authority and power delegated to the Secretary of the Interior in said leases shall cease, and all payments required to be made to the United States Indian agent shall thereafter be made to lessor or the then owner of said land, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to such leased land from which said restrictions are removed, except where a bond is required in said lease it shall be furnished with responsible surety, unless the giving of said bond is waived by lessor or the owner of the land. (Amended August 12, 1908. See p. 30.)

d. In event restrictions are removed from a part of the land included in a lease for oil, gas, or other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior, and all royalties thereunder shall be paid to the Indian agent until such time as the lessor and lessee shall furnish the Secretary of the Interior satisfactory information that adequate arrangements have been made to account for the oil, gas, or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulations provided.

43. These regulations shall be applicable to leases heretofore made and approved, as well as those hereafter entered into, except as otherwise herein provided.

Agricultural and Grazing Leases.

(Rewritten and Amended under Act of May 27, 1908. See Sections 15-17 of Regulations of June 20, 1908, p. 26.)

44. Allottees other than full blood of the Creek and Cherokee nations who desire to lease for terms longer than five years for agricultural purposes and one year for grazing purposes are required under existing law to have their leases approved by the Secretary of the Interior. Agricultural and grazing leases for shorter terms made by citizens other than full bloods do not require approval.

Allottees enrolled as full-blood members of the Choctaw, Chickasaw, Creek, Cherokee, and Seminole tribes can lease their allotments for a period longer than one year only with the approval of the Secretary of the Interior, and their homesteads only in
76 case of their inability, on account of infirmity or age, to work or farm them. And where leases are submitted for approval covering the homestead land the affidavit of a physician or other satisfactory evidence must be furnished showing the inability of the allottee to work or farm his homestead and the reason therefor.

Agricultural leases from full-bloods will not be made for a longer period than five years. Agricultural and grazing leases made under these regulations shall be made upon the forms prescribed herein.

In case it is desired to lease both the homestead and surplus of the full-blood allottee, separate leases shall be submitted.

45. All leases shall be in quadruplicate, and, with the papers required, shall be filed within thirty days from and after the date of execution with the United States Indian agent at Union Agency, Muskogee, Okla.

The Indian agent will make a full investigation to ascertain whether an allottee comes within the purview of the law, and in case of a lease upon homestead lands whether it will be to the best interests of the allottee to base such homestead, and whether the consideration named in the lease is a fair one. He will also ascertain the character and responsibility of the prospective lessee.

46. Lessees shall be required to furnish a bond executed by two or more sufficient sureties, each of whom must justify under oath to an amount equal to the entire rental, guaranteeing the payment of all rents at the time and in the manner specified in the lease and the performance of all covenants and agreements named in the lease.

47. The lessee, when requested, shall furnish any additional information required by the Department. The general rules herein prescribed for oil and gas leases will be followed so far as applicable to agricultural and grazing leases, particularly as to corporations.

48. The enforcement of these regulations in the field and the general supervision of oil and gas operations thereunder shall be under the direction of the Commissioner to the Five Civilized Tribes in Oklahoma after July 1, 1907.

C. F. LARRABEE,
Acting Commissioner of Indian Affairs.

Department of the Interior.

Washington, D. C., April 20, 1908.

Approved:
JAMES RUDOLPH GARFIELD,
Secretary.

77 Leasing and Removal of Restrictions.

June 20, 1908.

The folowing regulations are hereby prescribed for the purpose of carrying into effect those provisions of the Act of Congress approved May 27, 1908, (Public No. 140,) quoted herein.

I. The Commissioner to the Five Civilized Tribes is charged with the general supervision and the enforcement of these regulations.

District Agents.

(Section 6 of the Act Approved May 27, 1908.)

Sec. 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of the opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of said minors. The probate courts may, in their discretion, appoint any such representative

of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

78 And said representatives of the Secretary of the Interior are further authorized and it is made their duty, to counsel and advise all allottees, adults or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

Supplemental to the funds appropriated and available for expenses connected with the affairs of the Five Civilized Tribes, there is hereby appropriated for the salaries and expenses arising under this section, out of any funds in the Treasury not otherwise appropriated, the sum of ninety thousand dollars, to be available immediately, and until July first, nineteen hundred and nine, for expenditure under the direction of the Secretary of the Interior: Provided, That no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise.

And there is hereby further appropriated out of any money in the Treasury not otherwise appropriated, to be immediately available and available until expended as the Attorney-General may direct, the sum of fifty thousand dollars, to be used in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the Eastern judicial district of Oklahoma: Provided, That the sum of ten thousand dollars of the above amount, or so much thereof as may be necessary, may be expended in the prosecution of cases in the western judicial district of Oklahoma.

Any suit brought by the authority of the Secretary of the Interior against the vendee or mortgagee of a town lot, against whom the Secretary of the Interior may find upon investigation no fraud has been established, may be dismissed and the title quieted upon payment of the full balance due on the original appraisement of such lot: Provided, That such investigation must be concluded within six months after the passage of this act.

79 Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character what-

soever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act.

2. Local representatives appointed under the above quoted section 6, shall be known officially as "District Agents," and located in the various districts named herein comprising that part of the State of Oklahoma occupied by the Five Civilized Tribes. Such additional local representatives and the necessary assistance, including supervision, that may at any time be deemed necessary by the Secretary of the Interior to carry out the provisions of said section 6 and these regulations will be appointed or authorized. Such District Agents shall report to and act under the direction of the United States Indian Agent, Union Agency.

Description of Districts and Location of Offices of the District Agents on May 1, 1912.

District No. 1: Office at Vinita, comprising Craig, Mayes, Delaware and that part of Ottawa County within the Cherokee Nation.

District No. 2: Office at Nowata, comprising Washington, Nowata and Rogers Counties.

District No. 3: Office at Sapulpa, comprising Tulsa and Creek Counties.

District No. 4: Office at Okmulgee, comprising Okmulgee and Okfuskee Counties.

District No. 5: Office at Muskogee, comprising Wagoner, Muskogee and McIntosh Counties.

District No. 6: Office at Westville, comprising Cherokee, Adair and Sequoyah Counties.

District No. 7: Office at Poteau, comprising Haskell and Le Flore Counties.

District No. 8: Office at McAlester, comprising Pittsburg and Latimer Counties.

District No. 9: Office at Holdenville, comprising Hughes and Seminole Counties.

80 District No. 10: Office at Atoka, comprising Pontotoc, Coal and Atoka Counties.

District No. 11: Office at Pauls Valley, comprising McClain, Garvin and Murray Counties.

District No. 12: Office at Chickasha, comprising that part of Grady, Stephens and Jefferson Counties within the Chickasaw Nation.

District No. 13: Office at Ardmore, comprising Carter and Love Counties.

District No. 14: Office at Madill, comprising Johnson, Marshall and Bryan Counties.

District No. 15: Office at Hugo, comprising Choctaw and Pushmataha Counties.

District No. 16: Office at Idabel, comprising McCurtain County.

3. The offices of the District Agents shall be open from eight thirty a. m., to five p. m., each day, Sundays and legal holidays excepted, and any and all counsel and advice desired by allottees concerning deeds, leases or other instruments or matters relating to lands allotted to them shall be furnished by such agents free of charge. Each District Agent shall give his entire time to his official duties and shall not during his term of employment as such District Agent have any interest directly or indirectly in any transaction concerning leases covering lands of allottees or in the purchase or sale of any such lands regardless of whether the restrictions have or have not been removed. This prohibition, however, shall not apply to lands which such District Agents may have legally acquired before their employment.

4. Except when special circumstances require otherwise each District Agent will be required to be at his office during Friday and Saturday of each week and in the field the remainder of the time, except Sundays and legal holidays, visiting different localities for the purpose of procuring information and making necessary investigations as the law provides and as he may be directed.

5. Each District Agent shall examine the records of each county within his district at least once in each month, and oftener if directed, for the purpose of ascertaining the nature of transactions involving all lands and estates of all minor allottees, and also of restricted lands of adults, and shall perform such other duties as may be required. They shall report to the United States Indian Agent at the end of each month the work performed during such period and special reports shall be made immediately of any apparently illegal transaction involving the estates or allotments of allottees.

81 6. Copies of the reports of the District Agents to the Probate Courts as authorized by section 6 of the act, quoted, shall be forwarded to the Indian Agent.

7. Leases requiring the approval of the Secretary of the Interior should be filed with the District Agent of the District in which the leased land is situate and by him forwarded after investigation with report and recommendation to the Indian Agent, Union Agency.

8. Applications by allottees of restricted land for the removal of restrictions shall be presented to the District Agent of the District in which the applicant resides, and such applications, after investigation including a personal interview with the applicant, shall be forwarded to the Indian Agent with report and recommendation.

Leasing.

9. Sections 1 to 43, inclusive, of the Revised Regulations of April 20, 1908, governing the leasing of allotted lands of members of the

Five Civilized Tribes, with reference to oil, gas or other mineral leases are, with the following modifications, hereby repromulgated under and in accordance with and made applicable to the following quoted provisions of said Act, and shall, with said modifications, remain in full force and effect and Sections 44 to 48, inclusive, pertaining to agricultural and grazing leases are revised as hereinafter shown.

(Sections 2, 3, and 11 of the Act Approved May 27, 1908.)

Sec. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult; or by the guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And provided further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

82 Sec. 3. That the rolls of citizenship and of freedmen of the Five Civilized Tribes, approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

That no oil, gas or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior as if this Act had not been passed: Provided, That the owner or owners of any allotted land from which restrictions are removed by this Act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas, or mineral lease on said land whenever the owner or owners of said lands and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing cancelling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the

execution and acknowledgment of deeds, and the same shall be re
corded in the county where the land is situate.

Sec. 11. That all royalties arising on and after July first, nine
teen hundred and eight, from mineral leases of allotted Seminol
lands heretofore or hereafter made, which are subject to the super
vision of the Secretary of the Interior, shall be paid to the Unite
States Indian Agent, Union Agency, for the benefit of the India
lessor or his proper representative to whom such royalties shall there
after belong; and no such lease shall be made after said date excep
with the allottee or owner of the land: Provided, That the interes
of the Seminole Nation in leases or royalties arising thereunder on
all allotted lands shall cease on June thirtieth, nineteen hundre
and eight.

10. To expedite necessary investigation and final action lease
should hereafter be presented to the District Agent of the dis
83 trict in which the leased land is situate for transmission t
the Indian Agent at Union Agency.

11. No mineral lease which covers the land of a minor allottee and
requires the approval of the Secretary of the Interior shall be for a
term extending beyond the minority of such minor unless the court
having jurisdiction of the minor's estate and the Secretary of the In
terior shall approve such lease.

12. With the approval of the proper court and the Secretary of
the Interior, mineral leases covering land of minor allottees made
and approved upon forms authorized prior to the revised regulations
of April 20, 1908, may be modified to give to the parties thereto any
or all of the rights, privileges, conditions or terms of the lease form
approved April 20, 1908.

13. From and after July 1, 1908, mineral leases which require
the approval of the Secretary of the Interior covering lands of
Seminole allottees, as provided in section 11 of the Act of May 27,
1908, shall be made under these regulations without the approval of
the tribal authorities.

14. Section 10 of the regulations of April 20, 1908, is amended
to read as follows:

Lesses must procure and file with each an affidavit of the Indian
lessor, made before the District Agent, United States Indian Agent,
Union Agency, if possible, or if not, before a Federal Judge, Clerk
of the Federal Court, United States Commissioner or County or
District Judge, showing that the lease was understood by the lessor
and bonus agreements, if any. (See form D, prescribed, which also
covers lessee's affidavit of bonus and non-development.)

Agricultural, Grazing, and Other Leases Other Than Mineral.

15. Leases, other than mineral, covering restricted lands other
than homesteads for a period not exceeding five years without the
privilege of renewal, and leases covering restricted homesteads for

a period not exceeding one year, may be made by allottees without the approval of the Secretary of the Interior.

16. Leases other than mineral covering restricted lands for longer periods than provided above may be made with the approval of the Secretary of the Interior and not otherwise.

17. Leases other than mineral which require the approval of the Secretary of the Interior shall be made in quadruplicate upon forms prescribed by said Secretary, and with the papers required
84 shall be filed with the District Agent in which the land leased is situate within thirty days after the date of execution. Lessees are required to furnish a bond with satisfactory surety, in a sum equal to the entire rental. The general rules prescribed for oil and gas leases will be followed as far as applicable for leases for other purposes, particularly as to corporations. (See Amendment Dec. 21, 1914, pp. 41 and 52.)

18. Forms for leases other than mineral, agricultural and grazing have not been prescribed. Such leases on any satisfactory form will be considered.

Removal of Restrictions.

(Sections 1 and 9 of the Act of Congress Approved May 27, 1908.)

Sec. 1. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows. All lands, including homesteads, of said allottees enrolled, as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degress of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restrictions of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclu-

sive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid
85 and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

Sec. 9. That the death of any allottee of Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyonce of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restriction; if this be not done, or in the event the issue hereinbefore provided for die before April twnty-six, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided further, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

19. Adult members of the Five Civilized Tribes, whose allotments can not be sold or encumbered except after removal of restrictions therefrom by the Secretary of the Interior as provided by the above quoted provisions of law, and who desire to have the restrictions removed from all or part of such allotments, shall apply to the United States Indian Agent, Union Agency, through the District Agent of the district in which the applicant resides; the application to be made in duplicate on forms which have been prescribed and will be furnished free of charge on application to the United States Indian Agent or any District Agent.

20. The classes of restricted lands to which the above quoted provisions of laws and these regulations apply are as follows:

Homesteads of adult mixed-blood allottees having half or more than half and less than three-quarters Indian blood.

86 All allotted lands of adult mixed-bloods of three-quarters or more Indian blood.

All allotted lands of adult full-blood allottees.

21. When an application is received by a District Agent he shall, after investigation, including a personal interview with the applicant, forward the application with report and recommendation to the Indian Agent at Union Agency to be transmitted with his report and

recommendation for such action as the Secretary of the Interior may deem proper.

22. If the Secretary of the Interior finds that any applicant for the removal of restrictions should have the unrestricted control of his allotment he will remove the restrictions wholly or in part without conditions concerning terms of sale and disposal of the proceeds.

23. When, however, the Secretary of the Interior finds it to be for the best interests of any applicant that all or part of his restricted lands should be sold with conditions concerning terms of sale and disposal of the proceeds, he may remove the restrictions to become effective only and simultaneously with the execution of the deed by said applicant to the purchaser. Before said deed is executed the designated tract or tracts of land shall be sold upon such terms as the Secretary of the Interior may in each case specifically direct. Whenever the Secretary of the Interior so directs the Indian Agent will cause a description of the land with necessary information, to be posted at his office, and so far as practicable on the bulletin board at the Court House of each county within the territory occupied by the Five Civilized Tribes, and also at the office of each District Agent, for a period of not less than thirty days; and sealed bids for the purchase of any such land will be received at the office of the District Agent of the district in which the land is situate until two o'clock p. m., of the day on which the bids are to be opened, and the bids will be publicly opened immediately after that hour at the office of the District Agent. All bids shall be enclosed in a sealed envelope on which must be plainly written, "Bid for Indian Lands," and the date bids will be opened must be endorsed on the envelope. The envelope must not disclose the description of the land. Neither the Indain Agent nor any employe connected with the Indian Service will be allowed to prepare any bid or to assist in the preparation thereof. Each bid must be accompanied by a duly certified check on some solvent bank, for the use of the grantors, payable to the United States Indian Agent, Union Agency, for ten per cent of the amount bid as a guaranty for the faithful compliance by the bidder with his proposition. If the bid is accepted and the successful bidder shall fail, within ten days from the receipt of notice of the acceptance of his bid, to comply with the terms thereof such certified check will be forfeited to the use of the owner or owners of the land unless within thirty days after the date of opening bids the Secretary of the Interior shall order otherwise. The right to reject any or all bids is reserved. (See Amend. Jan. 16, 1915, p. 42.) (See Amend, April 13, 1916, p. 52.)

24. Each tract of land posted or offered for sale, as provided herein, shall, prior to the date bids are to be opened, be personally inspected and appraised at its full value by the Indian Agent at Union Agency, or such officer or employ as he may designate, and a certificate of such appraisement by the officer or employe making the appraisement shall be sealed and not opened until immediately after the bids received for that particular tract of land

are opened. The appraisement shall not be disclosed to any person prior to the opening of bids nor be made public thereafter (all appraisements now made public when tract advertised for sale, see amendment, p. 30), and no bid less than the appraised value shall be considered. All cost of conveyancing and recording shall be at the expense of the purchaser. The checks of unsuccessful bidders shall be returned at the earliest possible moment when properly receipted for to the Indian Agent.

25. Upon the proper consummation of a sale made in compliance with the directions of the Secretary of the Interior, the Indian Agent, or other officer in charge of the Union Agency, will make an endorsement upon the order for the removal of restrictions from the land sold, using the following form:

I hereby certify that, pursuant to the above order, the land described therein has been sold in compliance with the directions of the Secretary of the Interior, and that, to make the sale effective, deed for said land from said allottee to —— ——, the purchaser, was executed on —— —, 190-.

26. The Indian Agent, or other officer in charge of the Union Agency, will make an endorsement upon the deed also, using the following form:

I hereby certify that the land conveyed by this deed has been sold in compliance with the directions of the Secretary of the Interior pursuant to the order dated —— —, 190-, for the removal of restrictions from said land.

27. Such deed and the order for the removal of restrictions, thus endorsed shall, after proper record thereof has been made at the Union Agency, be delivered by the Indian Agent to the grantee.

88 28. The proceeds of such sales shall be held by said Indian Agent in his official capacity, and be disbursed for the benefit of the respective Indians as the Secretary of the Interior may direct in each case.

29. When the Secretary of the Interior deems it to be to the best interest of the allottee he will, as far as practicable direct that the payment for the land sold shall be part cash and the balance secured by a first mortgage on the premises conveyed, such balance to be paid upon such terms and conditions as may be designated in each case. (Amended April 20, 1912. See p. 35.)

C. F. LARRABEE,
Acting Commissioner of Indian Affairs.

Department of the Interior, June 20, 1908.

Approved:

JESSE E. WILSON,
Assistant Secretary.

Order of August 12, 1908.

Notice to Parties Holding Mineral Leases, Approved by the Department, on Lands from Which the Restrictions Have Been Removed.

The following provision has been adopted by the Department for the relinquishment of supervision of leases approved by the Secretary of the Interior on lands from which the restrictions have been removed.

"That under Section 42 of the Revised Leasing Regulations of April 20, 1908, in cases where the restrictions are removed where the Department is to relinquish supervision as provided in said section, the Indian Agent at Union Agency will notify the lessees that before such supervision will be relinquished, unless a new bond is waived by the lessor or owner of the land, as the regulations authorize, the lessee must furnish a bond running to the lessor, his heirs or assigns, in the same amount as originally required where such bond was made to the United States, and when such bond is filed with the Indian Agent, examined by him and the surety found to be satisfactory, it shall be forwarded to the lessor, his heirs or assigns, and both parties will thereupon be notified that the Department will no longer exercise supervision over the lease and the surety upon the original bond running to the United States
89 will be notified that it will only be liable for such obligations as accrued prior to the date of the new bond."

Upon the filing of a waiver of bond, the lessee and surety will be given the same notice of relinquishment of supervision as if a new bond were furnished.

Approved August 12, 1908.

JESSE E. WILSON,
Assistant Secretary.

Amendment of August 31, 1909.

To Section 24 of the Regulations of June 20, 1908, Governing the Removal of Restrictions in the Five Civilized Tribes.

"Each tract of land posted or offered for sale as provided herein shall, prior to the date bids are to be opened, be inspected and appraised at its full value under the direction of the Superintendent or other officer in charge of the Union Agency, Oklahoma, and the amount of such appraisement shall be stated in the advertisement and no bid for less than the appraised value shall be considered. All costs of conveyance and recording shall be at the expense of the purchaser. The checks of the unsuccessful bidders shall be re-

turned at the earliest possible moment when properly receipted for to the Superintendent at Union Agency."

F. H. ABBOTT,
Acting Commissioner.

Approved Aug. 31, 1909.
FRANK PIERCE,
First Assistant Secretary.

Amendment of July 23, 1910.

To the Regulations of April 20, 1908, Governing the Leasing of Lands of Members of the Five Civilized Tribes.

Section 25 of the Revised Regulations of April 20, 1908, covering the leasing of oil and gas lands in the Five Civilized Tribes, repromulgated June 20, 1908, is amended so as to read as follows:

All royalties, rents or payments accruing under any lease made for or on behalf of any minor or incompetent shall be held by the United States Indian Superintendent, Union Agency, or
90 such other disbursing officer as may be designated by the Secretary of the Interior, to the credit of the guardian (or curator) of such minor or incompetent and shall be paid to such guardian (or curator) upon voucher executed by him and approved by the Judge of the County (Probate) Court having jurisdiction of the estate of such minor or incompetent (the form of such voucher to be prescribed by the Department), or upon authority of such court in the form of an order satisfactory to said Superintendent or other officer in charge of the Union Agency.

C. F. HAUKE,
Second Assistant Commissioner.

Approved: July 23, 1910.
FRANK PIERCE,
First Assistant Secretary.

Amendments of February 6, 1911.

To the Regulations of April 20, 1908, Governing Leasing of Lands of Members of the Five Civilized Tribes in Oklahoma.

Effective May 1, 1911.

Sections 1, 16, 22 and 23 of the regulations, approved April 20, 1908, are hereby amended to read as follows:

1. Oil and gas leases requiring the approval of the Secretary of the Interior, may be made for a period of ten years from the date of the approval thereof by the Secretary of the Interior and as much longer thereafter as oil or gas is found in paying quantities; all leases shall be executed upon forms prescribed by the Department.

16. *a.* Oil and gas leases shall contain the following provision in lieu of that portion of paragraph 2 of the lease form approved April 20, 1908, which relates to the mining of gas and the payment of royalties thereon:

And the lessee shall pay as royalty on each gas-producing well $300 per annum in advance, to be calculated from the date of commencement of utilization: Provided, however, in the case of gas wells of small volume, when the rock pressure is 100 pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty which will become effective as a part of the lease: Provided, further, That in cases of gas wells
91 of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such an extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or nearby tracts, the lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises, provided there be surplus gas produced on said premises over and above enough to fully operate same. Failure on the part of the lessee to use a gas producing well, which can not profitably be utilized at the rate herein prescribed, shall not work a forfeiture of his lease so far as the same relates to mining oil, but if the lessee desires to retain gas producing privileges, the lessee shall pay a rental of one hundred dollars per annum in advance calculated from date of discovery of gas, on each gas-producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease. Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

b. The capacity of wells shall be ascertained under the supervision of the Secretary of the Interior, when necessary under the terms of the lease to determine the amount of royalty to be collected.

c. Except in cases of emergency, which shall not exceed ten days, not more than seventy-five per cent of the capacity of any gas well shall be utilized.

d. Evidence of date of discovery of gas wells and the beginning of utilization must be promptly furnished by the lessee in the form of a sworn statement.

22. In oil and gas leases until a producing well is completed on leased premises and in all other mineral leases advance royalty shall be paid annually in advance from the date of approval of the lease, as follows: 15 cents per acre per annum for the first and second years; 25 cents per acre for the fifth year, and on oil and gas leases one dollar per acre for each successive year; and in the case of mineral

leases other than for oil and gas, 75 cents per acre annually after the fifth year; the sums thus paid to be credited on the stipulated royalties.

92 The advance royalty for the first year shall be tendered at the time of the filing of the lease in the office of the United States Indian Superintendent at Union Agency.

On all mineral leases other than for oil and gas, when the annual advance royalty becomes due on a leased tract from which minerals are being produced, the lessee will not be required to pay the advance royalty until the royalty on production during the month within which the advance royalty falls due is accounted for; and if royalty on production equals or exceeds the advance royalty, it will be accepted as covering both items, but if it does not equal the advance royalty due, the lessee shall include the difference with his payment on production.

23. And oil and gas lessee shall drill at least one well on lease-hold within twelve months from the date of the approval of the lease by the Secretary of the Interior, or may delay drilling said well not exceeding ten years from the date of such approval by paying to the United States Indian Superintendent, Union Agency, Muskogee, Oklahoma, for the use and benefit of lessor (subject to the limitations and conditions in said lease contained), in addition to said advance royalty the sum of $1 per acre per annum, for each year the completion of such well is delayed, payable on or before the end of each year. The lessee may be required by the Secretary of the Interior, or by such officer as he may designate for the purpose, to drill and operate wells to offset wells on adjoining tracts and within three hundred feet of the dividing line, or in case of gas wells the lessee may have the option of paying on each proposed well a sum equal to the royalty, which, under these regulations, would be payable on the well to be offset instead of drilling such offset well. Offset wells must be drilled, or royalties paid in lieu of drilling, within ten days after the lessee is notified to do so, and failure to comply with such requirement shall constitute a violation of one of the substantial terms of the lease.

(Sections 22 and 23, Amended June 29, 1911. P. 34.)

Appropriate changes will be made in the lease form to provide for and carry into effect the provisions of the above modified regulations and such modifications of the regulations and lease form shall be effective May 1, 1911, and may, at the option of the parties, be incorporated in leases hereafter executed prior to that date. Said modified provisions may also be substituted in any lease, executed prior to said date on forms now or heretofore in use, in lieu of corresponding provisions contained in such leases, upon formal stipulations by the parties to that effect, when duly approved

93 by the Secretary of the Interior. All leases which embrace the said provisions, whether in original form or by substitution, shall be subject to these regulations.

These regulations shall not be construed as intended to affect existing approved leases except where such leases are modified by stipulation, as provided herein or where such leases are susceptible of modification in these respects by regulation.

F. H. ABBOTT,
Asst. Commissioner of Indian Affairs.

Department of the Interior, Washington, D. C., February 6, 1911.

Approved:
FRANK PIERCE,
First Assistant Secretary.

Amendments of June 29, 1911.

To the Regulations of April 20, 1908 (and Subsequent Amendments), Governing Leasing of Lands of Members of the Five Civilized Tribes in Oklahoma.

Sections 22 and 23 of the Regulations approved April 20, 1908, as re-written and amended February 6, 1911, are hereby amended as follows:

(22) Add the following paragraph to Section 22 as now written:

Advance royalty accruing under this section when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation of the lease, nor shall the lessee be relieved from his obligation to pay said advance royalty annually when it becomes due by reason of any subsequent surrender or cancellation of such lease.

(23) Section 23 of the Regulations (paragraph 4 of the lease form) will be entirely rewritten and is amended to read as follows:

Sec. 23. The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by the lease and shall drill at least one well thereon within one year from the date of approval of the lease by the Secretary of the Interior, or shall pay to the United States Indian Superintendent, Union Agency, Muskogee, Oklahoma, for the use and benefit of the lessor, for such whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other considerations named in the lease, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender the lease by executing and recording a proper release thereof and otherwise complying with paragraph 7 of the lease on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year, and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such

rental before the expiration of fifteen days after it becomes due at the end of any yearly period, during which a well has not been completed as provided herein, shall be a violation of one of the material and substantial terms and conditions of the lease, and be cause for cancellation of such lease under paragraph 9 thereof; but such cancellation shall not in any wise operate to release or relieve the lessee from the covenant and obligation to pay such rental or any other accrued obligation. The lessee may be required by the Secretary of the Interior, or by such officer as he may designate for the purpose, to drill and operate wells to offset wells on adjoining tracts and within three hundred feet of the dividing line, or in case of gas wells the lessee may have the option of paying on each proposed well a sum equal to the royalty, which, under these regulations would be payable on the well to be offset instead of drilling such offset well. Offset well must be drilled, or royalties paid in lieu of drilling, within ten days after the lessee is notified to do so, and failure to comply with such requirements shall constitute a violation of one of the substantial terms of the lease.

Pending unapproved leases will be approved upon the condition that the lessee and surety agree to the acceptance of the foregoing amendments, and appropriate changes will be made in the lease form to provide for and carry into effect such amendments.

F. H. ABBOTT,
Acting Commissioner of Indian Affairs.

Department of the Interior, Washington, D. C., June 29, 1911.

Approved:
SAMUEL ADAMS,
First Assistant Secretary.

95 *Amendment of April* 20, 1912.

To the Regulations of June 20, 1908, Governing the Removal of Restrictions in the Five Civilized Tribes.

Section 29 of the Regulations, approved June 20, 1908, under the acts of Congress of May 27, 1908, (35 Stat., 312) is hereby amended to read as follows:

29. Upon the approval by the Secretary of the Interior of a conditional order for the removal of restrictions, as provided in these regulations, the land covered thereby to be sold under the supervision of the Superintendent of the Union Agency, the said Superintendent is hereby authorized, in such cases, as he considers to be for the best interests of the respective allottees so to do, to advertise and sell said land by sealed bids or at public auction for not less than the appraised value, for cash or upon deferred payments, any such deferred payment sales to be made under the following terms:

Where the consideration is $500 or less, at least one-half to be paid in cash at the time of the sale and the remainder to be evidenced by purchasers notes due and payable in not more than eighteen months

after the date of purchase and secured by first mortgage on the premises conveyed.

Where the consideration exceeds $500, and is not more than $1,500, at least one-third to be paid in cash at the time of sale and the remainder in two equal payments evidenced by purchaser's note or notes to fall due not more than two and one-half years from date of purchase, and secured by first mortgage on the premises conveyed.

Where the consideration exceeds $1,500, at least one-fourth to be paid in cash at the time of sale and the remainder in three equal payments evidenced by purchaser's note or notes to fall due not more than three and one-half years from the date of purchase and secured by first mortgage on the premises conveyed.

All cash payments at the time of sale to be paid into the hands of the cashier and special disbursing agent of the Union Agency, Muskogee, Oklahoma, or his successor in authority, and all notes and mortgages securing same, to contain the express condition that no payment purporting to discharge, satisfy, or release the indebtedness evidenced thereby, unless such payments, and interest accruing thereon, are made to the cashier of the Union Agency, or his successor in authority, for the benefit of the proper allottees, or,
96 if such note or notes are properly negotiated with the approval of the Secretary of the Interior, to the owner or owners of such notes, shall operate as a release, satisfaction, discharge or payment thereof, and such notes shall be non-negotiable except with the approval of the Secretary of the Interior. Said note or notes shall be held by the said cashier of the Union Agency, or his successor in authority, for collection when due. Said note shall draw interest from date of execution until paid at the rate of eight per cent per annum.

All moneys received by the said cashier of the Union Agency, or his successor in authority, on account of deferred payments, and accrued interest thereon, shall be deposited or held to the credit of the proper allottee in Individual Bank Accounts, and to be subject to the rules, regulations, and orders of this Department governing the holding of moneys so deposited or the disbursement thereof.

This amendment shall apply to any order of this Department heretofore made covering the sale of allotted lands of members of the Five Civilized Tribes where the land covered by such order has not been sold and such order is still in effect.

ROBERT G. VALENTINE,
Commissioner of Indian Affairs.

Department of the Interior, April 20, 1912.

Approved:
SAMUEL ADAMS,
First Assistant Secretary.

Amendment of Oct. 14, 1907, to Section Fifteen of the Regulation of June 11, 1907, Governing the Leasing of Lands Allotted t Members of the Five Civilized Tribes in the Indian Territory.

Section fifteen of the regulations referred to above is hereb amended to read as follows:

15. The minimum rate of royalty on oil shall be ten (10) pe cent of the gross proceeds of all oil produced from the leased premises payment to be made at the time of the sale or disposition of the oil but the Secretary of the Interior may, from time to time, increas the existing minimum rate of royalty to a minimum rate not ex ceeding sixteen and two-thirds (16 2-3) per cent, provide 97 that any lease hereafter delivered to the lessee, in which th royalty specified is at any time less than the minimum rat of royalty in force at that time, as fixed in accordance herewith, shal be subject to such minimum rate of royalty instead of the rate orig inally specified in the lease.

C. F. LARABEE,
Acting Commissioner of Indian Affairs.

Department of the Interior, October 14, 1907.

Approved:
JAMES RUDOLPH GARFIELD,
Secretary.

Amendment of November 29, 1912.

Section 25 of the Revised Regulations of April 20, 1908, coverin the leasing of the lands in the Five Civilized Tribes repromulgate June 20, 1908, is further amended by adding to the said section a re-written and amended July 23, 1910, the following:

"Provided, however, that the said superintendent, or other office in charge of the Union Agency, is authorized, in his discretion where considered for the best interest of any adult, minor, or incom petent lessor, or his or her heirs, for whose account royalties, rent or payments accruing under any lease have been paid to said supe intendent, to withhold the disbursement of such royalties, rents payments, wholly or in part from any such adult, or guardian curator of any such minor or incompetent, or his or her heirs, unt such time or times as the payment thereof is considered best for th benefit of said lessor, or his or her heirs."

LEWIS C. LAYLIN,
Assistant Secretary.

Approved Nov. 29, 1912.

Amendments of May 12, 1913.

Effective June 1, 1913.

Sections 2, 26 and 30 of the regulations approved April 20, 1908, with subsequent amendments, are hereby further amended and modified to read as follows:

Sec. 2. All leases shall be in quadruplicate, and, with the papers required, shall be filed within thirty days from and after the date of execution by the lessor, with the United States Indian Superintendent at Union Agency, Muskogee, Oklahoma.

98 Assignments of leases and stipulations modifying the terms of existing leases shall also be filed with said Superintendent within thirty days from and after the date of execution.

A filing fee of $5 for each lease and each assignment, and $2 for each stipulation modifying the terms of existing contracts, is hereby required, and shall accompany each lease, assignment or stipulation from and after June 1, 1913. Such fees shall be accounted for by the disbursing agent of Union Agency as miscellaneous receipts Class IV, subject to disbursement under the regulations governing such funds.

Within twenty-four hours of the execution by an Indian lessor of an oil, gas, or other mineral lease, which requires the approval of the Secretary of the Interior, the lessee must either file in the office of the Superintendent of Union Agency or deposit in the mails addressed to said Superintendent a notice of the execution of such lease, signed by the lessee or his agent upon a form furnished with the lease blanks, showing date and hour of execution, description of land, names of parties, character of lease, etc. It is preferred that these notices be sent by registered mail. If not so sent, other proof of mailing may be required. Immediately upon receipt of such notice by the Superintendent, entry thereof will be made in the same manner as leases are indexed for the information and notice of the public. Failure to file the lease within thirty days from and after the date of execution, will be considered an abandonment thereof, and the land may be leased to other parties.

Filing fees will be increased in the discretion of the Secretary of the Interior where assignments and stipulations are not filed within the required time.

Sec. 26. Operations will not be permitted under any lease requiring approval of the Secretary of the Interior, until the approved lease has been delivered. If there has been a contest respecting a lease or leases, the approved, disapproved or cancelled parts thereof will be held in the office of the Superintendent for five days after promulgation by him, by mailing or delivery, of the Department's decision, and will not be delivered, if within that period a motion for review or reconsideration be filed, until such motion is passed upon by the Department.

Sec. 30. (*a*) Lessees drilling for oil or gas on Indian lands must keep at each well ready for immediate use, the best approved facilities for capping the well to prevent the waste of gas or oil in the case of the unexpected flow of either from the well; in case of wells already under way, immediately notify the Superintendent of the Union Agency of the exact location of each well and the kind
99 of equipment for capping oil and gas wells provided by them. Lessees must hereafter furnish such report immediately upon the commencement of every new well.

(*b*) In all oil or gas wells where gas occurs above the oil, the gas must be forced back and held in the strata until needed,—in which case the drilling for oil can be resumed as soon as the gas has been confined in its own stratum—or the drilling must be discontinued and the well securely capped to prevent the waste of the gas; or the gas must be cased off and brought out of the well for use, separate from the oil.

In no case shall gas occurring in strata above the oil be used to lift oil from the oil bearing strata to the surface and be allowed to escape.

(*c*) Operators will be expected to exercise every reasonable precaution to avoid waste of natural gas, after separation from the oil, where the gas occurs in the same strata and comes from the wells with the oil.

In general, every possible precaution must be taken to stop the present waste and prevent future waste of natural gas both at the wells from connecting pipe lines, and also to prevent the wasteful use of gas about the wells.

(*d*) When, in the course of drilling, operators strike water, drilling must be stopped, before proceeding into the strata, until adequate provision has been made for permanently shutting out the water and thus preventing its reaching either the overlying or underlying oil and gas-bearing strata.

(*e*) A failure on the part of the lessee or operators to prevent a waste of gas and to prevent the oil and gas strata from an inflow of water, as provided by the regulations, shall be a violation of one of the material and substantial terms and conditions of the lease and shall subject the lease to cancellation by the Secretary of the Interior.

These amendments shall become effective and be in full force from and after June 1, 1913, and supersede all former regulations in conflict therewith.

F. H. ABBOTT,
Acting Commissioner of Indian Affairs.

Department of the Interior, Washington, D. C., May 12, 1913.

Approved:
FRANKLIN K. LANE,
Secretary.

100 *Amendment of December* 21, 1914.

Agricultural Leases.

Section 17 of the regulations of April 20, 1908, as amended June 20, 1908, is hereby amended and modified to read as follows:

"Leases, other than mineral, which require the approval of the Secretary of the Interior, shall be made in quadruplicate upon forms prescribed by said Secretary, and with the papers required shall be filed as soon as possible after execution with the field clerk or other local representative in charge of the district in which the land is situated. Any unusual delay in filing must be explained, and if more than thirty days, the consent of the lessor may, in the discretion of the Commissioner of Indian Affairs, be required. Provided, that no such lease will be accepted or filed after the expiration of 60 days from the date of its execution. Lessees, when required, shall furnish bond with satisfactory surety, in a sum equal to the entire rental. The general rules prescribed for oil and gas leases will be followed as far as applicable for leases for other purposes, particularly as to corporations."

E. B. MERITT,
Assistant Commissioner of Indian Affairs.

Department of the Interior, Washington, D. C., December 21, 1914.

Approved:
BO SWEENEY,
Assistant Secretary.

Amendment of January 16, 1915.

Section 23 of the regulations approved June 20, 1908, under the provisions of the Act of Congress approved May 27, 1908 (35 Stats. 312), is hereby amended to read as follows:

Bids for the purchase of allotted Indian lands of restricted allottees will be received at the office of the local field representative of the Department for the district in which the land is situate at the duly advertised hour of the day on which the bids are to be received and such hour shall not be earlier than ten o'clock a. m., and not later than four o'clock p. m., of the date set for the sale.

Section 29 of the regulations approved June 20, 1908, and the Amendment thereto approved April 20, 1912, under the Act of Congress approved May 27, 1908 (35 Stats. 312), is hereby amended to read as follows:

101 Notes representing deferred payments of consideration paid for allotted Indian lands of restricted allottees shall bear interest from date of execution until paid at the rate of six per cent per annum.

These amendments shall apply to any order of the Department heretofore made covering the sale of allotted lands of members of the Five Civilized Tribes where the lands covered by such order have not been sold and such order is still in effect.

CATO SELLS,
Commissioner of Indian Affairs.

Department of the Interior, January 16, 1915.

Approved:
A. A. JONES,
First Assistant Secretary of the Interior.

Amendment of June 18, 1915, *to Section* 11 *of Regulations of April* 20, 1908.

In connection with the consideration and approval of leases of minors' lands, the following general rules are promulgated:

1. A lease for a term extending beyond the minority of the lessor will not be considered unless it is sufficiently shown that such a lease is necessary to prevent damage by reason of drainage or otherwise.

2. Leases covering the lands of minors who will become of age in one or two years will not be favorably considered unless there is likelihood of the land being jeopardized during such period by reason of development of the adjacent properties.

3. Minors' leases will be approved except as mentioned in Rule 1 to continue during the minority of lessor and as long thereafter as oil or gas is found in paying quantities where said minors will become of age in two years or more. The stipulated term, however, not to exceed ten years.

Department of the Interior, Washington, D. C., June 18, 1915.

Approved:
BO SWEENEY,
Assistant Secretary.

102 *Amendment of November* 20, 1915.

Section 12 of the regulations of April 20, 1908, is amended to read as follows:

"The right is specifically reserved to increase the amount of any such bond above the sum named in any particular case and to accept substitute bonds where the Secretary of the Interior deemed it proper to do so. Bonds covering other mineral leases shall be in such sum as may be fixed by the Secretary."

E. B. MERITT,
Assistant Commissioner.

Approved Nov. 20, 1915.
BO SWEENEY,
Assistant Secretary.

Regulations to Govern Oil and Gas Operations on Restricted Indian Lands in Oklahoma.

Definitions.

The following expressions, wherever used in the lease and regulations, shall have the meaning now designated, viz:

Superintendent.—The superintendent of any Indian agency in Oklahoma, or any other person who may be in charge of such agency and reservation, and it shall be his duty to enforce compliance with these regulations.

Inspector.—Any person appointed as inspector of oil and gas operations, or who may be designated by the Secretary of the Interior or the Commissioner of Indian Affairs to supervise oil or gas operations on restricted Indian lands, acting under general instructions from the Bureau of Mines and under the supervision of the superintendent.

Oil Lessee.—Any person, firm, or corporation to whom an oil-mining lease is made under these regulations.

Gas Lessee.—Any person, firm, or corporation to whom a gas lease is made under these regulations.

Leased Lands.—The term "leased lands" or "leased premises" or "leased tract" shall mean any restricted lands belonging to Indian allottees within the State of Oklahoma from which restrictions have not been removed, and which have been leased by such allottee with the approval of the Secretary of the Interior.

103 Operations.

1. No operations shall be permitted upon any tract of land until a lease covering such tract shall have been approved by the Secretary of the Interior.

Powers and Duties of Inspector.

It shall be the duty of the inspector—

2. To visit from time to time leased lands where oil and gas mining operations are being conducted and to inspect and supervise such operations, with a view to preventing waste of oil and gas, damage to oil, gas, or water bearing formations, or to coal measurers or other mineral bearing deposits, or injury to property or life, in accordance with the provisions of these regulations.

3. To make reports to the superintendent and to the Bureau of Mines as to the general conditions of the leases, property, and the manner in which operations are being conducted and his orders complied with.

4. To consult and advise with the superintendent as to the condition of the leased lands and to submit information and recommendations from time to time for safeguarding and protecting the property of the lessor and securing compliance with the provisions of these regulations.

5. To give such orders or notices as may be necessary to secure compliance with the regulations and to issue all necessary instructions or orders to lessees to stop or modify such methods or practices as he may consider contrary to the provisions of such regulations.

6. To modify or prohibit the use or continuance of any operation or method which, in his opinion, is causing or is likely to cause any surface or underground waste of oil or gas or injury to any oil, gas, water, coal, or other mineral formation, or which is dangerous to life or property or in violation of the provisions of these regulations.

7. To prescribe, subject to the approval of the superintendent, the manner and form in which all records or reports called for by these regulations shall be made by the lessee.

8. To prohibit the drilling of any well into any producing sand, when in his opinion and with the approval of the superintendent the marketing facilities are inadequate, or insufficient provision has been made for controlling the flow of oil or gas reasonably to be expected therefrom, until such time as suitable provision can be made.

104 9. To prescribe or approve the methods of drilling wells through coal measures or other mineral deposits.

10. To determine when and under what conditions a producing well may be drilled deeper and under what conditions a producing well or sand may be abandoned.

11. To require that tests shall be made to detect waste of oil and gas or the presence of water in a well, and to prescribe or approve the methods of conducting such tests.

12. To require that any condition existing subsequent to the completion of a well which is causing, or is likely to cause, damage to an oil, gas, or water-bearing formation, or to coal measures, or other mineral deposits, or which is dangerous to life or property, be corrected as he may prescribe or approve.

13. To approve the type or size of separators used to separate the oil, gas, or water coming from a well.

14. The inspector may limit the percentage of the open flow capacity of any well which may be utilized when in his opinion such action is necessary to properly protect the gas-producing formation.

15. The inspector shall be the sole judge of whether his orders have been fully complied with and carried out.

Duties of Lessees.

16. Before actual drilling or development operations are commenced on the leased lands, or within not less than 30 days from the date of approval of these regulations in case of producing leases, or leased lands on which such operations have been commenced prior to such approval, the lessee or assignee shall appoint a local or resident representative within Osage County or Oklahoma on whom the superintendent or other authorized representative of the Department of the Interior may serve notices or otherwise communicate with, in securing compliance with these regulations and shall notify the superintendent of the name and post-office address of the representative so appointed.

In the event of the incapacity or absence from the county of such designated local or resident representative, the lessee shall appoint some person to serve in his stead and in the absence of such representative, or of notice of the appointment of a substitute, any employee of the lessee upon the leased premises or the contractor or other person in charge of drilling operations thereon shall be considered the representative of the lessee for the purpose of service of orders or notices as herein provided, and service upon any such employee,
105 contractor, or other person shall be deemed service from the lessee.

17. Five days prior to the commencement of drilling operations lessee shall submit, on forms to be furnished by the superintendent, a report in duplicate showing the location of the proposed wells.

18. Lessee shall keep upon the leased premises accurate records of the drilling, redrilling, or deepening of all wells, showing formations drilled through, casing used, together with other information as indicated on prescribed forms to be furnished by the superintendent and shall transmit such and other reports of operations when required by the superintendent.

19. Lessee shall furnish on the 1st day of January and the 1st day of July of each year a plat in manner and form as prescribed by the superintendent, showing all wells, active or abandoned, on the leased lands, and other related information. Blank plats will be furnished upon application.

20. Lessee shall clearly and permanently mark all rigs or wells in a conspicuous place, with the name of the lessee and the number or designation of the well, and shall take all necessary precautions for the preservation of these markings.

21. Lessee shall not drill within 300 feet of boundary line of leased land except with the consent of the superintendent. Lessee shall not locate any well or tank within 200 feet of any public highway or any building used as a dwelling, granary, barn, or established watering place, except with the written permission of the superintendent.

22. Lessee shall notify the superintendent, in advance, of intention to use the mud-fluid process of drilling, so that the inspector may approve the method and material to be used, in the event the operator is not familiar with the process.

23. Lessee shall provide a properly prepared slush pit into which all said pumpings and other materials extracted from the well during the process of drilling shall be deposited. Such sand pumpings and materials shall not be allowed to run over the surface of the land. The construction of such pits shall be subject to the approval of the inspector.

24. Lessee shall effectually shut out and exclude all water from any oil or gas-bearing stratum and take all proper precaution and measures to prevent the contamination or pollution of any fresh water supply encountered in any well drilled for oil or gas.

106 25. Lessee shall protect to the satisfaction of the inspector each productive oil or gas-bearing formation drilled through for the purpose of producing oil or gas from a lower formation.

26. Lessee shall place an approved gate valve, or other approved controlling device, on the innermost string of casing seated in the well, and keep same in place and in proper condition for use until the well is completed, whenever drilling operations are commenced in "wildcat" territory, or in a gas or oil field where high pressures are known to exist, whenever the inspector shall deem same necessary for the proper control of the production from the well.

27. When natural gas is encountered in commercial quantities in any well, lessee shall confine such gas to its natural stratum until such time as the same can be produced and utilized without waste, it being understood that a commercial quantity of gas produced by a well is any unrestricted flow of natural gas in excess of 2,000,000 cubic feet per 24 hours: Provided, That if in the opinion of the superintendent gas of a lesser quantity shall be of commercial value, the superintendent shall have authority to require the conservation of said gas. Water shall not be introduced into any well where such introduction will operate to kill or restrict the open flow of gas therein.

28. Lessee shall separate the oil from the gas when both are produced in commercial quantities from the same formation or under such conditions as might result in waste of oil or gas in commercial quantities.

29. Lessee shall not use natural gas from a distinct or separate stratum for the purpose of flowing or lifting the oil.

30. Lessee shall prevent oil or gas or both from escaping from any well into the open air, and not permit any oil or gas well to go wild or to burn wastefully.

31. Lessee shall not use natural gas in place of steam to operate engines or pumps under direct pressure except with the special permission of the inspector.

32. Lessee shall not use natural gas in flambeau lights, save as authorized or approved by the inspector.

33. Lessee shall use every possible precaution, in accordance with the most approved methods, to stop and prevent waste of natural gas and oil, or both, at the wells and from connecting lines, and to prevent the wasteful utilization of such gas about the well.

107 34. Lessee shall notify the superintendent a reasonable time in advance of starting work, of intention to drill, deepen, plug, or abandon a well; and whenever the superintendent or inspector has given notice that extra precautions are necessary in the plugging of wells in a particular territory, lessee shall give at least three days' advance notice of such intended plugging.

35. Lessee shall not abandon any well for the purpose of drilling deeper for oil or gas unless the producing stratum is properly protected, and shall not abandon any well producing oil or gas except with the approval of the superintendent or where it can be demonstrated that the further operation of such well is commercially unprofitable.

36. Lessee shall plug and fill all dry or abandoned wells on the leased lands in the manner required, and where any such well penetrate an oil or gas bearing formation it shall be thoroughly cleaned to the bottom of the hole before being plugged or filled, and shall then be filled with mud-laden fluid of a consistency approved by the inspector, from the bottom to the top thereof, before any casing is removed from the well, or in lieu of the use of such mud fluid, each oil and gas bearing formation shall be adequately protected by cement, or approved plugs, or by both such plugs and cement, and the well filled in above and below such cement or plugs with material approved by the inspector.

Where both fresh and salt water are encountered in any dry or abandoned well which is not being filled with mud-laden fluid as hereinbefore provided, the fresh water shall be sufficiently protected against contamination by cement or approved plugs, or by both such cement and plugs, to be placed at such points in the well as the inspector shall approve for the protection of the fresh water.

37. If such abandoned or dry well be in a coal bed or other mineral vein deposit, or be in such condition as to warrant taking extraordinary precautions, the inspector may require such variations in the above-prescribed methods of plugging and filling as may be necessary in his judgment to protect such seam or deposit against infiltration of gas or water, and to protect all other strata encountered in the well.

38. The manner in which such mud-laden fluid, cement, or plugs shall be introduced into any well being plugged and the type of plugs so used, shall be subject to the approval of the inspector.

In the event the lessee or operator shall fail to plug properly any dry or abandoned well in accordance with these regulations, 108 the superintendent may, after five days' notice to the parties in interest, plug such well at the expense of the lessee or his surety.

39. All B.-S. or water from tanks or wells shall be drained off into proper receptacles located at a safe distance from tanks, wells, or buildings, to the end that same may be disposed of by being burned or transported from the premises.

Where it is impossible to burn the B.-S., or where it is necessary to pump salt water in such quantities as would damage the surface of the leased land, or adjoining property, or pollute any fresh water, the lessee shall notify the superintendent, who shall give instructions in each instance as to the disposition of such B.-S. or salt water.

40. Lessee shall make a full and complete report to the superintendent of all accidents or fires occurring on the leased premises.

41. Lessee shall provide approved tankage of suitable shape for accurate measurement, into which all production of crude oil shall be run from the wells, and shall furnish the superintendent copies of accurate tank tables and all run tickets, as and when requested.

42. The superintendent may make arrangements with the purchasers of oil for the payment of the royalty, but such arrangements, if made, shall not relieve the lessee from responsibility for the payment of the royalty should such purchaser fail, neglect, or refuse to pay the royalty when it becomes due: Provided, That no oil shall be run to any purchaser or delivered to the pipe line or other carrier for shipment or otherwise conveyed or removed from the leased premises until a division order is executed, filed, and approved by the superintendent, showing that the lessee has a regularly approved lease in effect and the conditions under which the oil may be run. Lessees shall be required to pay for all oil or gas used off the leased premises for operating purposes; affidavits shall be made as to the production used for such purposes and royalty paid in the usual manner. The lessee or his representatives shall be present when oil is taken from the leased premises under any division order, and will be responsible for the correct measurement thereof and shall report all oil so run.

The lessee shall also authorize the pipe-line company or the purchaser of oil to furnish the superintendent with a monthly statement, not later than the 10th day of the following calendar month, of the gross barrels run as common carrier shipment or purchased from his lease or leases.

109 43. Lessee will not be permitted to use any timber from any Osage lands except under written agreement with the owner, and in all cases where lands are restricted such agreement shall be subject to the approval of the superintendent or inspector. Lessee shall, when requested by the superintendent, furnish a statement under oath as to whether the rig timbers were purchased on the leased tract, and if so, state the name of the person from whom purchased and give such other information regarding the procurement of timber as the superintendent may desire.

44. Unless expressly provided for in the lease, lessees shall pay to the superintendent for the parties in interest all reasonable damage done to the surface and any growing crops thereon or to improvements on said land in the amounts of such damage when agreed upon between the parties in interest. When such amount can not be agreed upon, any of such parties may notify the superintendent, whereupon the superintendent shall notify the parties in interest that if such claims can not be arbitrated satisfactorily, he will, after 10 days from date of notice, investigate the matter of damage, such notice to be sent the lessee, allottee, or his heirs, and such other person as may have informed the superintendent in writing of a claim to an interest in such lands. The superintendent shall thereupon determine the damage and apportionment thereof between the parties in interest, such determination to be final unless an appeal therefrom be taken to the Secretary of the Interior within 10 days from the date of notice of such determination. The decision of the Secretary of the Interior shall be final and conclusive upon all parties concerned. The lessee shall be permitted to proceed with operations pending determination of the amount of damage by the superintendent upon depositing with the superintendent such amount as he may stipulate as sufficient to cover the damages claimed, and such lessee may continue with operations pending appeal upon depositing such additional amount, if any, as may be sufficient to cover the damages as fixed and apportioned by the superintendent, the surplus, if any, to be returned to the lessee. Pending action upon the appeal so much of said amount as is not in dispute by the parties in interest may be disbursed.

45. Failure to comply with any provision of these regulations shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a fine of not more than $500 per day for each and every day the terms of the lease or of the regulations are violated, or the orders of the superintendent pertaining thereto are not complied with, or to both such fine and cancellation, in the discretion of the Secretary of the Interior: Provided, That the lessee shall be
110 entitled to notice and hearing with respect to the terms of the lease or of the regulations violated, which hearing shall be held by the superintendent, whose finding shall be conclusive unless appeal be taken to the Secretary of the Interior within 30 days after notice of the superintendent's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

46. These regulations shall become effective and in full force from and after the date of approval and shall be subject to change or alteration at any time by the Secretary of the Interior.

E. B. MERRITT,
Assistant Commissioner of Indian Affairs.
VAN H. MANNING,
Director Bureau of Mines.

Approved:
Department of the Interior.
FRANKLIN K. LANE.

Amendment of January 29, 1916.

(Agricultural Leases.)

Department of the Interior.

Office Commissioner of Indian Affairs.

Washington, D. C.

Mr. Gabe E. Parker,
Supt. Five Civilized Tribes.

MY DEAR MR. PARKER:

All Agricultural leases which under the law (Act of May 27, 1908) must be made under rules and regulations prescribed by the Secretary of the Interior and with his approval, may well be finally acted upon in your office, and thus avoid the delay incident to transmitting the same to this city. The effect of this will be to permit the lessee to obtain possession of the land at an earlier date.

Therefore, authority is hereby granted for the Superintendent for the Five Civilized Tribes, or the Acting Superintendent in the absence of the Superintendent or his inability to act, to approve all such leases in the name of the Secretary of the Interior.

If the approval is made by you, it would be as follows:

"Approved:
FRANKLIN K. LANE,
Secretary of the Interior,
By GABE E. PARKER,
Superintendent for the Five Civilized Tribes."

111 After action shall have been taken in the manner indicated, you will forward the original of the lease in each case for filing in the Indian office.

Sincerely yours,

CATO SELLS,
Commissioner.

Approved Jan. 29, 1916.
FRANKLIN K. LANE,
Secretary.

Amendment of April 23, 1916.

Section 23 of the regulations approved June 20, 1908, under the provisions, of the Act of Congress approved May 27, 1908 (35 Stat., 312), as amended on January 16, 1915, is hereby amended to read as follows:

Bids for the purchase of allotted Indian lands of restricted allottees will be received at such place, or places, as may be designated by the Superintendent for the Five Civilized Tribes at the duly advertised hour of the day on which the bids are to be received, and such hour shall not be earlier than 10 o'clock a. m., and not later than 4 o'clock p. m., of the date set for the sale.

BO SWEENEY,
Assistant Secretary of the Interior.

Department of the Interior, Washington, D. C., April 13, 1916.

In the District Court of the United States for the Eastern District of Oklahoma.

No. 2596. E.

PEARL CHISHOLM et al., Plaintiffs,

vs.

CREEK AND INDIANA DEVELOPMENT COMPANY et al., Defendants.

Now come the appellants, Sperry Oil & Gas Company and Oklahoma Producing & Refining Corporation of America (the Creek and Indiana Development Company named as one of the original defendants in the bill of complaint herein having neither been served with any process nor in any manner having entered any appearance in this case) and by their solicitors state that the foregoing constitutes in simple and condensed form all the evidence admitted and that offered and rejected, and all the proceedings at the final hearing of this action, in the District Court of the United States for the Eastern District of Oklahoma, the testimony of the witnesses being stated in the exact words of the witnesses because of the fact that the same is very brief and that it is necessary to give the exact language in order to reflect correctly said testimony; and the appellants
112 desire that all such testimony be reproduced and pray the court so to direct.

Wherefore, appellants pray that said statement be approved.

ALVIN RICHARDS,
PRESTON C. WEST,
Solicitors for Appellants.

In the District Court of the United States for the Eastern District of Oklahoma.

No. 2596. Equity.

PEARL CHISHOLM et al., Plaintiffs,

vs.

CREEK AND INDIANA DEVELOPMENT COMPANY et al., Defendants.

Order Approving Statement of Evidence.

Now on this 2nd day of January, A. D. 1921, came on to be considered the statement of defendants of the evidence to be included in the evidence on appeal to the United States Circuit Court of Appeals for the Eighth Cercuit in above entitled cause,

And the court having examined the same finds it to be a true and correct statement of the evidence taken and introduced upon the trial of said cause, and that it is necessary and proper to have said statement of the evidence of witnesses in the exact language given by the witnesses as prayed for by appellants.

It is therefore by the court adjudged and decreed that the above and foregoing statement of the evidence constitutes the entire evidence taken and introduced in said cause, and the same is hereby approved and made a part of the record in said cause for the purpose of appeal.

R. L. WILLIAMS,
Judge.

Counsel for plaintiffs in this cause agree that the foregoing statement of evidence is true and correct and that the foregoing order approving said statement may be signed by the judge without further notice to plaintiffs or their counsel.

LANGLEY & LANGLEY,
S. R. LEWIS, AND
O. S. BOOTH,
Solicitors for Plaintiffs.

Filed Jan. 2, 1922.
W. V. McCLURE,
Clerk U. S. District Court.

113 *Assignment of Errors.*

Now come the Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America (the Creek and Indiana Development Company named as one of the defendants in the original bill of complaint herein having neither been served with any process nor in any manner ever entered any appearance in this cause) and feeling themselves aggrieved by the final decree of this court entered on the 10th day of November, A. D. 1921, and in con-

nection with their appeal to the United States Circuit Court of Appeals for the Eighth Circuit, which appeal was on said date prayed and allowed in open court, as fully appears from the decree signed and filed on said date, herewith present their assignment of errors.

Said appellants Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America, by their attorneys Alvin Richards and Preston C. West, say that in the record and proceedings, and in the final decree aforesaid, manifest, error has intervened, to the prejudice of appellants, to-wit:

First. The District Court of the United States for the Eastern District of Oklahoma erred in finding, holding and decreeing that plaintiffs were entitled to the immediate, full, complete and exclusive possession of the lands involved in this suit and that appellant Oklahoma Producing and Refining Corporation of America had no right, title or interest therein for any purpose whatever and enjoining said appellant from interfering with plaintiffs' full and exclusive possession of said premises.

Second. The District Court of the United States for the Eastern District of Oklahoma erred in finding, holding and decreeing that the instrument executed by Webster Chisholm, dated March 9, 1914, extending in force the original lease dated May 14, 1904, was null and void and that the appellants had no right, title, interest or privilege in and to said lands by virtue thereof.

Third. The District Court of the United States for the Eastern Disrict of Oklahoma erred in not finding, holding and decreeing that the instrument executed by Webster Chisholm dated March 9, 1914, extending in force the original lease dated May 14, 1904, was good, valid and effectual to confer upon the original lessee and its assignees the oil and gas mining rights in the lands covered by said lease and extension agreement, so long as oil or gas should be produced therefrom in paying quantities.

114 Fourth. The District Court of the United States for the Eastern District of Oklahoma erred in not finding, holding and decreasing that the instrument executed by Webster Chisholm, dated March 9, 1914, extending in force the original lease dated March 14, 1904, was good, valid and effectual to confer upon original lessee and its assignees the oil and gas mining rights in so much at least of the lands covered by said original lease, as constituted the thirty-acre Indian homestead portion of Webster Chisholm's allotment, so long as oil or gas should be produced therefrom in paying quantities.

Fifth. The District Court of the United States for the Eastern District of Oklahoma erred in declining and refusing to hold that plaintiffs Webster Chisholm and Pearl Chisholm were estopped by their acts and conduct, and by the receipt of royalties under the extension agreement and extended lease, to question the validity of said extension agreement or the extension of the original lease as modified thereby.

Wherefore, appellants pray that the decree of the District Court of the United States for the Easern District of Oklahoma may be reversed, and the cause remanded with direction to enter a decree for the defendants dismissing complainants' bill.

ALVIN RICHARDS,
PRESTON C. WEST,
Attorneys for Appellants.

Filed Dec. 6, 1921.
W. V. McCLURE,
Clerk U. S. District Court.

Præcipe for Record.

To W. V. McClure,
Clerk of the above-named court:

You are requested to make a transcript of the record in the above entitled cause, to be filed in the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to appeal allowed in said cause; to include in such transcript of the record the following and no other:

1. The Bill of Complaint and the Answers of all the answering defendants. (Exhibits may be omitted.)

2. Appellants' Condensed Statement of Evidence at the final hearing herein.

3. Final decree of the court for the plaintiffs and against the defendants and adjudging the stipulation of Webster Chisholm dated March 9, 1918, extending in force the original lease of May 14, 1914, null and void and enjoining the defendants from interfering with the plaintiffs in the full and exclusive possession of the premises involved.

115

4. Assignment of Errors.

5. Notice and election as to printing record.

6. Certificate of Clerk to record.

ALVIN RICHARDS,
PRESTON C. WEST,
Solicitors for Defendants, Sperry Oil & Gas Company and Oklahoma Producing & Refining Corporation of America.

The appellants, defendants Sperry Oil & Gas Company and Oklahoma Producing & Refining Corporation of America in the above entitled cause, do hereby designate that the record on the appeal herein to the United States Circuit Court of Appeals for the Eighth Circuit be printed under the supervision of the Clerk of the United States District Court for the Eastern District of Oklahoma, at Muskogee, Oklahoma.

ALVIN RICHARDS,
PRESTON C. WEST,
Solicitors for Sperry Oil & Gas Company and Oklahoma Producing & Refining Corporation of America.

We, the undersigned attorneys for the complainants, Pearl Chisholm and Webster Chisholm, do hereby acknowledge receipt of the above designation of parts of the record necessary for the consideration of the errors assigned by the defendants, Sperry Oil & Gas Company and Oklahoma Producing & Refining Corporation of America, and waive the designation of any other parts of the record, and agree that the above include all the portions of the record material or necessary for the consideration of the errors assigned; and we also acknowledge service of notice of the fining in the Clerk's office at the time of the filing of this Præcipe, of the record of appellants' condensed statement of evidence and proceedings at the final hearing of this action, and agree that said condensed [—] is correct and that the Judge of the United States District Court for the Eastern District of Oklahoma may sign and approve said condensed statement at the time and place fixed in the notice, to-wit, in the United States Court Room in the United States Court House, in the city of Muskogee, Oklahoma, on the 26th day of December, A. D. 1921, or any day thereafter.

116 And we hereby acknowledge due service of notice and of election as to printing of the record in this cause.

Dated at Muskogee, Oklahoma, this 22nd day of December, A. D. 1921.

LANGLEY & LANGLEY,
S. R. LEWIS, AND
O. S. BOOTH,
Solicitors for Defendants.

Filed Dec. 23, 1921.
W. V. McCLURE,
Clerk U. S. District Court.

Application for Enlargement of Time to File Transcript of Record.

To Honorable R. L. Williams, Judge of the District Court of the United States for Eastern District of Oklahoma.

Come now the appealing defendants, Oklahoma Producing and Refining Corporation of America and Sperry Oil & Gas Company, and respectfully represent that on account of unavoidable circumstances it will be impossible for these appealing defendants to lodge the record in this cause with the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit at Saint Louis, Missouri, by or before the 9th day of January, 1922, the last day on which this cause should be docketed and the record therein filed with the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in accordance with the requirements of the order of this court allowing the appeal made and entered at the time of rendering the final decree herein and as a part of said final decree; that owing to the absence of the Judge from the District it has been impossible to have the statement of evidence signed and certified by him until, to-wit, January 2, 1922, and that although the record is not a large one sufficient time does not remain for complying with the original order.

Wherefore these appealing defendants pray that they be granted an enlargement of time herein in which to docket said case and appeal and file the record thereof with the Clerk of the said United States Circuit Court of Appeals for the Eighth Circuit, and that they be granted an enlargement of time for the purpose of docketing said case and appeal and filing said record for an additional period of thirty (30) days, and that an order enlarging and extending the time for docketing this appeal and filing said record in said
117 United States Circuit Court of Appeals for the Eighth Circuit until the 8th day of February, 1922, be made and entered.

ALVIN RICHARDS,
PRESTON C. WEST,
Solicitors for Oklahoma Producing and Refining Corporation of America and Sperry Oil & Gas Company.

Received a copy of the annexed and foregoing application for an enlargement of time, on this 3rd day of January, A. D. 1922, and it is agreed that the same be granted.

LANGLEY & LANGLEY,
S. R. LEWIS,
O. L. BOOTH,
Attorney- for Webster Chisholm and Pearl Chisholm.

Filed January 4, 1922.
W. V. McCLURE,
Clerk.

Order Enlarging the Time to File Transcript of Record.

On this 4th day of January, A. D. 1922, there was presented to the Honorable R. L. Williams, Judge of the District Court of the United States for the Eastern District of Oklahoma, the application of the appealing defendants, Oklahoma Producing and Refining Corporation of America and Sperry Oil & Gas Company, for an enlargement of time of thirty (30) days in which said appealing defendants can docket said appeal and file the record in this cause with the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, which time as provided by the original order herein which is a part of the final decree, expires on the 9th day of January, 1922,

It appearing that good cause exists and is shown for granting an enlargement of time asked for in said application, and all parties having agreed thereto,

It is therefore ordered that said application be and the same is hereby granted, and there is allowed an enlargement of time of thirty (30) days from the 9th day of January, 1922, to said appealing defendants, in which to docket said appeal and file the record herein with the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in the city of Saint Louis, Missouri; and said appealing defendants are hereby granted an extension and enlargement of

time for the docketing of said case and filing said record until the 8th day of February, 1922, and that said cause and appeal can be docketed and said record filed in said United States Circuit
118 Court of Appeals for the Eighth Circuit with the Clerk of said United States Circuit Court of Appeals for the Eighth Circuit by or before the 8th day of February, 1922.

R. L. WILLIAMS,
Judge.

Filed January 4, 1922.
W. V. McCLURE,
Clerk.

Certificate of Clerk.

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss.

I, W. V. McClure, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of Pearl Chisholm and Webster Chisholm vs. Creek and Indiana Development Company et al., in Equity No. 2596, as was ordered by præcipe of counsel herein to be prepared and authenticated, as the same appears from the records in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Muskogee, this 13th day of January, A. D. 1922.

[SEAL.]

W. V. McCLURE,
Clerk.
By WARREN BUTZ,
Deputy.

119 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(*Order of Submission.*)

United States Circuit Court of Appeals, Eighth Circuit,
May Term, 1922.

Tuesday, May 16, 1922.

No. 6017.

SPERRY OIL & GAS COMPANY et al., Appellants,
vs.
PEARL CHISHOLM et al.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Preston C. West for appellants,

continued by Mr. J. Howard Langley for appellees, and concluded by Mr. Preston C. West for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

120 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1922.

No. 6017.

SPERRY OIL & GAS COMPANY and OKLAHOMA PRODUCING AND REFINING CORPORATION OF AMERICA, Appellants,

vs.

PEARL CHISHOLM and WEBSTER CHISHOLM, Appellees.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Mr. Preston C. West (Mr. Alvin Richards, Mr. A. A. Davidson, Mr. Roger S. Sherman and Mr. Grey Moore were with him on the brief), for appellants.

Mr. J. Howard Langley (Mr. Harve N. Langley, Mr. S. R. Lewis, and Mr. O. S. Booth were with him on the brief), for appellees.

Before Carland and Kenyon, Circuit Judges, and Johnson, District Judge.

CARLAND, *Circuit Judge*, delivered the opinion of the Court.

This is an appeal from a decree adjudging appellants to have no interest in or right of possession to the real estate hereinafter mentioned and enjoining them from interfering with appellees full and exclusive possession thereof. The facts as found by the trial court are as follows:

"That the real estate involved in this cause, viz:

"The South Half of the Southeast Quarter of section thirteen, township twenty-one north and range twelve east, situs in Tulsa County, Oklahoma, is the allotment of the plaintiff, Webster Chisholm, a half-blood Cherokee Indian, whose Cherokee Citizen Roll Number is 30,871, said lands being regularly conveyed to him by the Cherokee Nation as his said allotment and distributive share of the tribal lands of said Nation or Tribe of Indians, and that, of the aforesaid eighty acres of land, the following parcel constitutes his tribal homestead allotment, viz:

121 "The West Half of the Southwest Quarter of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter of the Southeast Quarter of said section, township, range

and county, and that the remainder of said eighty acres of land constitutes the tribal surplus allotment of said Webster Chisholm, that upon May 14, 1904, the plaintiff, Webster Chisholm, whilst a single person, executed an oil and gas lease covering all of said eighty acres of lands aforedescribed, in favor of defendant, Creek and Indiana Development Company, a corporation, said lease being duly approved by the Secretary of the Interior on May 4, 1905, and that said lessee entered upon said premises and explored and discovered oil in paying quantities, and that the said lessee, Creek and Indiana Development Company, a corporation, thereafter, on July 18, 9114, sold and assigned its rights and interest in said lease unto the defendant, Sperry Oil & Gas Company, a corporation; and, that thereafter, on November 25th, 1918, the said assignee, Sperry Oil & Gas Company, a corporation, sold and assigned its rights and interest in said lease unto the defendant, Oklahoma Producing & Refining Corporation of America, a corporation, and that the last named assignee has continued to and is now operating said lease for oil and gas as afterward modified and attempted to be extended, and removing oil and gas from said lands; that the lease executed by the plaintiff, Webster Chisholm, upon May 14, 1904, aforesaid, was made for a definite period of fifteen years from its date, and that said lease expired, terminated and ended on May 14, 1919; that upon the 11th day of November, 1911, the plaintiffs, Webster Chisholm and Pearl Chisholm were legally married, and that the plaintiffs moved upon the lands involved in this cause in the spring of the year 1912, and then and there the state homestead status attached thereto, and that they have continuously and uninterruptedly since then and to this time occupied the aforedescribed land as their home and homestead under the state law; that neither of the plaintiffs have or possess any other real estate than that involved in this suit; that the plaintiffs have from their occupancy of said lands in the spring of — year 1912 claimed the aforesaid land as their homestead, and that said lands have constituted their homestead under the constitution and statute laws of Oklahoma from their occupancy thereof in the spring of — year 1912, and have so continued to be occupied by them as their homestead, and now constitutes the same, and was such homestead at the time the supplemental contract was executed by Webster Chisholm.

122 "The court further finds that upon March 9th, 1914, the plaintiff Webster Chisholm signed, executed and delivered unto defendant, Creek and Indiana Development Company, a corporation, an instrument in writing under its terms extending in force as long as oil or gas is found in paying quantities, the lease aforementioned, and that said instrument under such terms extending in force as long as oil or gas is found in paying quantities, the lease aforementioned (the lease so extended being dated May 14, 1904) increased the royalty from one-tenth of the total production to one-eighth of the total production; that said instrument providing for the extending in force and continuing the terms of the original lease dated May 14, 1904, was not executed or joined in by the plaintiff, Pearl Chisholm, his wife, but executed only by the said Webster

Chisholm; that the said Pearl Chisholm, the then wife of the said Webster Chisholm, did not join in the execution of said instrument, nor did she give her consent thereto, nor did she have knowledge thereof, and that the said Pearl Chisholm had no knowledge of the existence of said instrument extending in force and continuing the terms of said lease until after May 14, 1919, and just prior to the beginning of this action; and the court further finds that the instrument dated March 9th, 1914, extending in force and continuing the terms of the original lease aforesaid, is null and void, for the reason that the wife of the said Webster Chisholm, viz: the said Pearl Chisholm, did not join in the execution of the same.

There was no provision in the original lease stipulating for an extension or renewal thereof. The ruling of the trial court holding the renewal lease void because Pearl Chisholm did not join therein, is assigned as error. The ultimate question presented is, whether the laws of Oklahoma relating to the conveyance of the homestead as defined by said laws are repugnant to the laws of Congress regulating the leasing of restricted Indian lands. The word "restricted" meaning in this connection, lands that were non-alienable for the period of twenty-five years from date of allotment. The laws of Congress providing for the leasing of restricted Indian allotments at the time of the lease of May 14, 1904, and the renewal thereof March 9, 1914, were as follows:

By the Cherokee agreement (Act of Congress approved July 21, 1902, 32 Stat. L. 716), the allotment of Webster Chisholm was restricted as to alienation, and by section 72 of the said agreement, it was provided:

123 "Cherokee citizens may rent their allotments when selected for a term not to exceed * * *; but leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes and for mineral purposes may also be made with the approval of the Secretary of the Interior and not otherwise."

By Sec. 1 of the Act of Congress approved May 27, 1908 (35 Stat. 312), the restrictions on the 50 acres embraced in the lease designated as surplus allotments were removed but the restrictions remained upon the 30 acres designated as a homestead allotment. Sec. 2 of the same Act provided:

"That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, * * * and not otherwise."

The regulation of the Secretary of the Interior where restrictions were removed from a part of the land included in a lease for oil, gas and other mineral purposes was as follows:

"In event restriction are removed from a part of the land included in a lease for oil, gas or other mineral purposes, the entire

lease shall continue subject to approval and supervision of the Secretary of the Interior, and all royalties thereunder shall be paid to the Indian Agent until such time as the lessor and lessee shall furnish the Secretary of the Interior satisfactory information that adequate arrangements have been made to account for the oil, gas, or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulations provided."

It does not appear that the lessor and lessee in the case now under consideration ever furnished the Secretary of the Interior satisfactory information that adequate arrangements had been made to account for the oil, gas or mineral upon the restricted land separately from that upon the unrestricted. The laws relating to the creation of a homestead and the conveyance thereof in the State of Oklahoma are as follows:

124 The Oklahoma Enabling Act, approved June 16, 1906, by Sec. 21, provided as follows:

"* * * And all laws in force in the territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said state, except as modified or changed by this Act or by the Constitution of the State * * *." (34 Stat. L. 277).

The Constitution of the State of Oklahoma, Art 12, Sec. 1, defines the homestead as follows:

"The homestead of any family in this State, not within any city, town, or village, shall consist of not more than one hundred sixty acres of land, which may be in one or more parcels, to be selected by the owner. * * * *That nothing in the laws of the United States, or any treaties with the Indian Tribes in the State, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the State.*" Italics ours.

The above Section of the Constitution was also enacted into the Revised Statutes of Oklahoma, 1910, appearing as Sec. 3343. Sec. 2 of Art. 12, Constitution of Oklahoma, provides as follows:

"The homestead of the family shall be, and is hereby protected from forced sale for the payment of debts, except for the purchase money * * * nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law."

Sec. 3342 of the Revised Laws of Oklahoma, provides as follows:

"The following property shall be reserved to the head of every family residing in the State exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided:

"First. The homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife."

At the time of the admission of the State of Oklahoma into the Union there was in force Sec. 880, Wilson's Revised Laws of Oklahoma, 1903, which contained the following language:

"* * * And no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced, except to the extent hereinafter provided."

Sec. 1143 Rev. Laws of Oklahoma, 1910, contains this same provision with the addition of the words "or legally separated", which laws were in force and effect at the time of the execution of the renewal lease of March 9, 1914. It clearly appears from the laws thus quoted that so far as the laws of Oklahoma are concerned, the renewal lease was void. The question now presented is, whether Sec. 72 of the Cherokee agreement or Sec. 1 of the Act of Congress approved May 27, 1908, supra, are repugnant to and inconsistent with the provisions of the laws of Oklahoma which declare that no deed, mortgage or contract relating to the homestead exempt by law shall be valid unless in writing and subscribed by both husband and wife. Does the provision of the State Law in regard to the conveyance or leasing of the homestead prevent or hinder in any way the Secretary of the Interior from exercising his full power and authority under the laws of Congress referred to? It appears to us that they do not. We cannot see why the provisions of both State and Federal law may not be given full force. Both provisions have for their object the same ultimate result. If the renewal lease had been executed by Pearl Chisholm, it still would have been subject to the approval of the Secretary of the Interior and it is no where claimed that the approval of the Secretary standing alone would make a contract between the contracting parties. A valid contract must have been made by the parties themselves, so that when it was presented to the Secretary of the Interior for his approval, it might come in the form of a valid contract made between the parties but subject to the approval of the Secretary before it should become effective. In the present instance the alleged contract came to the Secretary in the form of a lease but void under the laws of Oklahoma. The Secretary's approval could not remedy the want of power in Webster Chisholm to make the lease. We think the case of Jennings v. Wood, et al., 192 Fed. 507, decided by this court, is very much in point. In the case cited it was held that under Sec. 72, heretofore quoted in this opinion, the approval of the Secretary would not validate a lease which was invalid
126 because the lessor was a minor and not competent to make it.

In delivering the opinion of the court in the case cited, Judge Hook used the following language:

"The jurisdiction of the Secretary of the Interior is only that expressed in the acts of Congress. He was not constituted the general guardian of the estates of the Indians in the sense in which that term is usually employed. Power was not conferred upon him to originate and make leases of allotted lands. That was left to the Indians subject to his approval in specified cases. If an Indian did not desire to lease there was nothing for the Secretary to act upon; if he did, and the lease was for oil and gas, its validity depended on the approval of that official, but he was not one of the contracting parties. On the contrary, his connection with the transaction and his authority first arose after the minds of the contractors came together, and they must have been competent to make the contract submitted for approval. A disapproval was merely a veto. An approval which proceeds upon a consideration of the terms of the instrument offered and whether they are reasonably for the interests of the Indian was intended as an additional safeguard for his protection. It would not, however, reach back and supply or confirm all the essential, legal prerequisites of a valid contract."

The present case is not similar to the case of Blanset v. Carden, et al., 261 Fed. 309, decided by this court and affirmed by the Supreme Court May 16, 1921. In the Blanset case the regulations of the Secretary of the Interior authorized by Congress provided that an Indian married woman could by will dispose of all of her allotted land. A law of Oklahoma provided that no woman while married should bequeath more than two-thirds of her property away from her husband. It was decided in that case that the provisions of the law of Oklahoma restricting the right of a married Indian woman to dispose of her property by will was repugnant and inconsistent with the rights conferred by the regulations of the Secretary of the Interior. In such a case of course, the conclusion reached by this court was correct as the regulations of the Secretary of the Interior having been made by the authority of Congress had the force of law and were deemed made for the protection of the Indians and their property, during the period of restriction on alienation. By Sec. 1 of the Act of May 27, 1908, supra, the restriction on
127 50 acres of the land in controversy was removed so at the time the renewal lease was made only 30 acres of the land were restricted and the Cherokee agreement and the Act of 1908 only refer to restricted lands, therefore 50 acres were subject only to the laws of Oklahoma and the renewal lease would be void as to those acres in any event, and we are of the opinion that it was void as to all because the parties to the pretended renewal contract had no contract to present to the Secretary of the Interior for approval. We do not think the regulations of the Secretary of the Interior quoted in this opinion as applicable to cases where part of the lands subject to an oil and gas lease have been removed have the effect to reimpose a restriction which Congress has removed. We take the regulation to mean that if the parties do not agree upon any other way for accounting for the oil, gas or mineral from the restricted lands separate from the unrestricted lands that they will be

deemed to have consented that the Secretary of the Interior still shall have that duty to perform. Before the State of Oklahoma could be admitted to the Union, its Constitution, especially where the rights of the United States or of the Indian tribes in Oklahoma were concerned, had to be accepted by the United States. There was a provision of the Constitution of Oklahoma, Sec. 1, Art. 12, that nothing in the laws of the United States or any treaties with the Indian Tribes in the State should deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the State.

This court will take judicial notice that a large portion of the citizens of the Territory of Oklahoma and the Indian Territory who framed the Constitution of Oklahoma were Indians who owned their own homes and lands and that this provision of the Constitution was undoubtedly placed in the Constitution by such Indian citizens for their own protection. This we think is a legitimate argument to make in favor of the proposition that Congress never intended by law or regulation to deprive any Indian or other allottee in Oklahoma of the benefit of the homestead and exemption laws of the State. The use of the words "homestead" and "surplus" in allotments made to Indians was in order to classify the lands. The real homestead which a citizen of Oklahoma is entitled to, is created by the laws of the State.

It is next claimed that appellees are estopped from claiming that the renewal lease is void. Webster Chisholm received all the royalties accruing in the original lease and the attempted extension
128 thereof but his wife Pearl Chisholm received no part thereof.

The trial court found that after the expiration of the lease of May 14, 1904, which was May 14, 1919, the land produced $22,944.40 of oil for the period of about seven months, and Webster Chisholm received the stipulated royalty on this oil and therefore the court denied him any portion of the value of of the oil except the royalty. We do not think that an estoppel as to the land can be urged against the appellees for the reason that Pearl Chisholm, the wife of Webster Chisholm had no knowledge of the renewal lease dated March 9, 1914, no knowledge of the operation of the lessee under the same, and in no way directly or indirectly encouraged the lessee in such operation. Appellants obtained this renewal lease more than five years before the expiration of the original lease. Any operations of the appellants in the production of oil would not attract the attention of anyone knowing that the original lease did not expire until 1919. In addition to the lack of knowledge on the part of Pearl Chisholm against whom estoppel is urged, there is an entire absence of evidence on the part of appellants that they would not have done the things they did but for the conduct of the parties sought to be estopped. Counsel for appellants further urge that in case the court should be of the opinion that the renewal lease was void and that the appellees are not estopped that the court as a court of equity having full control of the case ought to mould the relief so as to give appellees the possession of their homestead but still at the same time grant to the appellants the right to extract oil under the renewal lease as that would not inter-

fere with the homestead rights of appellees. If the renewal lease is void, and we decide that it was and is, this court has no power to confer any rights upon the appellants and thus violate on its part, the laws of Oklahoma.

We are clearly of the opinion that the judgment of the lower court holding the renewal lease void was correct and its judgment is affirmed.

Filed July 3, 1922.

129 (*Decree.*)

United States Circuit Court of Appeals Eighth Circuit, May Term, 1922.

Friday, July 7, 1922.

No. 6017.

SPERRY OIL AND GAS COMPANY and OKLAHOMA PRODUCING AND REFINING CORPORATION OF AMERICA, Appellants,

vs.

PEARL CHISHOLM and WEBSTER CHISHOLM.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Pearl Chisholm and Webster Chisholm have and recover against the Sperry Oil and Gas Company and Oklahoma Producing and Refining Corporation of America the sum of twenty dollars for their costs herein and have execution therefor.

July 7, 1922.

130 In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 6017.

SPERRY OIL & GAS COMPANY et al., Appellants,

vs.

PEARL CHISHOLM et al., Appellees.

Appeal from the United States District Court for the Eastern District of Oklahoma.

Petition for Rehearing.

Having carefully examined the opinion of this honorable court, we think that with propriety, we may ask the court to consider whether this cause be not one in which it will be proper to grant a rehearing to the appellants, on the following grounds:

First.

Because the decision necessarily results in creating a conflict between the federal and state law on the matter in controversy, and by which the former is made subordinate to the latter, as to the leasing for oil and gas of restricted Indian lands.

The necessary effect of the decision is that no married, restricted Indian of the Five Civilized Tribes can make an oil and gas lease of his or her allotment unless joined in by his or her spouse, who may not be an Indian at all, if the land is occupied by them as a
131 home. It takes away the personal right of the Indian to make such a contract, and of course, renders the Secretary of the Interior powerless in the matter, notwithstanding that Congress gave him control of restricted Indian allotments, particularly the leasing of them for oil and gas, and expressly provided in section 1 of the Enabling Act for the admission of Oklahoma:

"That nothing contained in the state constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished), or to limit or affect the authority of the United States government to make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, law or otherwise, *which it would have been competent to make if this Act had never been passed.*" (Italics ours.)

By the decision, the right of the Indian owner of restricted land to lease the same for oil and gas, is held to be impaired and limited by the state constitution, in that the homestead provision thereof prevents his execution of a mineral lease unless his non-citizen wife con-

sents to, and joins therein, and the authority of the United States government is not only limited and affected, but its powers are actually taken away, by such constitutional provision.

The insistence that the Indians of the Five Civilized Tribes are entitled to the benefit of the homestead of the state presents a false issue. That, we respectfully submit, is not the question in the case. What we are asserting is, that an Indian in the exercise of rights relating to his restricted lands, and the control thereof by the Secretary of the Interior, cannot be limited by, or made subject to, the laws of the state, if the Indian is otherwise competent to deal with the subject; that a married, restricted Indian has the right to execute and submit for the approval of the Secretary an oil and gas lease of his allotment, and that this right cannot be limited impaired or
132 affected by the homestead provision of the state constitution which would make the right dependent upon whether the spouse, who might be a white person, consented to the exercise of such right. The homestead provision exempts land from forced sale for the payment of debts. A restricted Indian needs no such protection, for the restriction against alienation, and the control over his land vested by Congress in the Secretary of the Interior affords him all the protection which the homestead exemption does, and much more, because the national government can, in its own name and through its own courts, secure it for him. A reference to his homestead rights in his own land is meaningless. It is of no benefit to him personally, and if he is permitted to invoke it, it must be for the benefit of his wife against some act of his own. If the act is unauthorized by federal law, it is void, apart from any consideration of state law; if the act is authorized, and has received the approval of the Secretary of the Interior, how can either he or his wife invoke a state law to invalidate it, or destroy such approval, unless indeed Congress intended this result to follow. But where is the proof of that? The legislation which fixes the status of Indian lands, and the rights of the Indian, and the authority of the Secretary of the Interior relative thereto, is the Act of May 27th, 1908, passed long after the adoption of the constitutional provision referred to. We are unable to find a single syllable in that Act, and we are referred to none, from which the conclusion can be drawn that Congress intended that the authority of the Indian to execute an oil and gas lease of his restricted land, and the control of the Secretary of the Interior over the same, were, in any way, to be affected by, or that the execution of such lease, and its validity, and therefore, the Secretary's power of approval, were dependent on, the homestead law of the state which takes away the right of the Indian owner, in
133 the circumstances considered, to execute a lease without the joinder of his wife, and imposes a duty on the courts to declare such a lease, and its approval, absolutely void. Section 2 of that Act provides that the allotment "may be leased by the allottee * * *; Provided, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, and

not otherwise." It is difficult to believe that leases made and approved in strict compliance with these provisions are yet wholly void because, in the execution and approval of them, the restrictions imposed by a state law were not observed. The provisions of section 1, article 12, of the state constitution "that nothing in the laws of the United States, or any treaties with the Indian tribes in the state, shall deprive any Indian or other allottee of the benefit of the homestead and exemption law of the state," cannot be construed to have the effect to impair the exclusive power of the Secretary of the Interior acting under congressional authority. It is as if the state had declared that notwithstanding the national government has expressly reserved the right to legislate and control the Indian portion of our population, their lands and property, and to regulate how and in what manner they shall dispose of, or lease their allotments (and which is necessarily exclusive), we shall yet ignore such reservation of power and all acts done thereunder, if the lands so leased embrace a homestead recognized by our laws.

What the quoted provision of section 1, article 12 of the constitution means, we think, is that Indians shall not be limited or confined in their homestead claims to the "homestead" part of their allotment, designated by federal law, but shall be entitled to the full one hundred and sixty acres guaranteed to all citizens by the constitution, whenever that question becomes pertinent. Such claim could
134 arise only when it became necessary to protect their lands from forced sale, a contingency which could not possibly happen during the restricted period. This construction gives the provision effect, while the construction adopted by the court brings it into conflict with federal law. It could not have been the intent of the constitution, in view of the state's acceptance of the Enabling Act, to apply the homestead provision of the constitution and the statutes enacted thereunder, to interfere with the making of an oil and gas lease of an Indian's restricted land, over which the national government has admittedly exclusive and plenary control.

If it were necessary, we might concede that there is no conflict in fact, between the state law on the one hand and the Acts of Congress and the regulations prescribed thereunder by the Secretary of the Interior, on the other. The homestead exemption may be given full effect without the necessity of striking down the lease. An oil and gas lease, unlike an agricultural lease, does not impair the enjoyment of the homestead privilege, that is, the right to live upon and occupy the land. Pearl Chisholm married the allottee after the land had been developed for oil and gas, and, after her marriage and occupancy of the land, other wells were drilled and operated. The occupancy of the premises by herself and husband after March 4th, 1919, was, and for the future will be, subject to exactly the same physical conditions as before. As a practical matter, their enjoyment of the land as a home is not affected by the lease, and we do not understand that the decision is based on the consideration that the renewal agreement disturbed in fact such enjoyment, or will have any different result than the original lease would have brought about, but that it is based solely on the technical, legal right on the part of Pearl Chis-

holm, or her husband for her, to have it set aside as invalid under the state law which forbids the same except upon a condition imposed by the requirements of that law.

135 The necessary effect of the decision, however, is to bring about a conflict which does not in fact exist, for, if the decision is sound, a restricted Indian cannot lease his allotment, and the Secretary of the Interior loses all control of the matter, however urgent the case may be, unless a third party, in whom the federal government has no interest, and over whom it has no control, yields consent, a consent made necessary only by a law of the state. He cannot even execute a five-year agricultural lease, authorized by the Acts of Congress, without the approval of the Secretary of the Interior, and for a longer period, with the approval of the Secretary of the Interior, because a state law disqualifies him from making such a lease for more than a year, unless his wife joins therein. In other words, the Indian's spouse is the arbiter, in the first instance at least, as to what use the Indian may put his restricted allotment. The court concludes that both federal and state law have the same object, and therefore there is no conflict. By the federal law, the Indian is restrained from making any mineral lease of his restricted land, and from making any other lease for more than five years without the approval of the Secretary. By the state law, if the decision is correct, he is restrained from making any kind of a lease for more than one year without the approval of his wife, or, to put it in another way, the federal law permits the Indian to make a mineral lease of his restricted land with the Secretary's approval, but the state law permits that right only with his wife's approval, which must first be manifested in the manner required by state law before the Secretary can exercise his authority at all. The conclusion that this situation involves no conflict is certainly difficult to understand, and it is not obviated, we respectfully submit, by saying that the Secretary of the Interior still has control over the situation, provided that a valid contract is submitted to him, for to say that, and at the same time to say that the Indian cannot make a valid contract

136 without complying with the state law, amounts to a declaration that the state law controls, notwithstanding the specific provision of the Enabling Act to the contrary.

The case of Jennings v. Wood, 192 Fed. 507, cited in the opinion as very much in point, was a case in which the lease was attempted to be executed by one personally incompetent under general law, to make any contract by reason of the disability of minority—a disability, of course, recognized by federal, as well as state law. In the case at bar, Webster Chisholm was not personally incompetent. The renewal of the lease on his part, was valid in every respect, except for the state homestead law, which, it is held, destroys its validity and divests the power of the Secretary of the Interior to approve it, a power which he would have possessed had there been no such state law, or had the Enabling Act never been passed. The power of the Secretary is precisely the same as it was before the Enabling Act was passed. Western Investment Co. v. Tiger, 221 U. S. 309. It is not strictly correct, we respectfully submit, to say that the Indian lessor

has the sole right to make his own contracts, and in his own way, and that the power of the Secretary is only that of veto. His powers, we believe, are broader than a mere right of approval or disapproval. In LaMotte v. United States, 254 U. S. 570, the Supreme Court said, quoting from the syllabus:

"The Secretary is authorized, not merely to approve leases after execution, but to make necessary, reasonable regulations, prescribing in advance as conditions to approval of leases, the mode in which they shall be passed to him, and the terms and conditions they shall contain for the protection of the Indian lessor."

It was urged in that case that what was intended by the regulations of the Secretary of the Interior, relative to the leasing of restricted Indian lands, was to leave the Indian free to lease in his own way and on his own terms, subject to the Secretary's approval or
137 disapproval of the lease, after it was made. The court said that such insistence was not tenable; that the regulations of the Secretary, providing the character and provisions of the lease contract which the Indian might make, operated to restrain him from leasing in his own way, but that that was no valid objection. In other words, the view of that court seems to be that while an Indian lessor is nominally the contracting party, in substance and reality, it is the Secretary of the Interior who makes the contract.

The decision seems to assume that the Indian has a right to repudiate his lease, because he is entitled to the benefit of the homestead provision of the state law. But if he can have a contract judicially invalidated because of one provision of state law, we see no reason why he may not invoke any other state law for the same purpose. The State Supreme Court has held, in Carlile v. National Oil & Development Company, 201 Pac. 377, that an extension and renewal of a minor's lease, duly approved by the probate court having jurisdiction of the person and estate of the minor, is void if not made in compliance with Rule 9 of the Probate Rules prescribed by the Justices of the Supreme Court, which, it is held, have the force and effect of a law of the state, and in Winona Oil Company v. Barnes, 200 Pac. —, it was held that the minor in such a case, on becoming of age, might invoke such state law to have the extension and renewal set aside. In White v. Sallee, decided by the state Supreme Court June 27th, 1922, and reported in volume 18 of the Appellate Court Reporter, page 481, it is held that, as to the sale of a restricted Indian allotment, made through the probate court, the laws of the state, which would make the sale void, have no application. In that case, the adult Indian heirs of the allottee sought to have the sale vacated by invoking the state law on the subject. In the case at bar, the decision would give to the non-Indian wife of a restricted Indian, the right to invoke the law of her sovereignty to destroy the
138 lease, valid under the laws of her husband's sovereignty. Such, in our opinion, was not the intention of the Acts of Congress upon the subject. The provisions of these Acts that allottees may sell, lease or dispose of their allotment during the restricted period, in accordance with their provisions and the regulations pre-

scribed by the Secretary of the Interior thereunder, exclude the pertinency or application of any law of the state, particularly, we think, any law which would require, as a condition of the exercise of the Secretary's powers under these Acts, the consent of one interested only as the spouse of the allottee.

May we not urge a reconsideration of that portion of the opinion dealing with the case of Blansett v. Cardin, 261 Fed. 319? The theory of the plaintiff in that case, was that his Indian wife, in disposing of her allotment, was subject to state law so far as that law affected his rights. The wife was given authority by Congress, subject to the approval of the Secretary of the Interior, to make a will, devising her allotment, and it was held that, in view of such authority, she did not have to consider her husband's rights under the state law, or the limitations which that law imposed upon the acts of a non-Indian testator. Here, Webster Chisholm and the Secretary of the Interior exercised an authority expressly recognized by the Acts of Congress. Yet the holding is that these Acts are ineffective, solely because of a limitation imposed by state law, the purpose of which law is the protection of the wife and family of Webster Chisholm in his lands, and not for his own personal benefit as the Indian owner, a matter solely within the jurisdiction of the national government. Had the Blansett case involved the question of homestead, and the husband's rights under the state law, we apprehend that the decision would have been the same, for the Supreme Court said in regard to the authority of the Indian and of the Secretary of the Interior, to dispose of the allotment:

139 "The Act of Congress is complete in its control and administration of the allotment and of all that is connected with, or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma code."

Surely the allotment of Webster Chisholm, at least insofar as it relates to the restricted portion of it and the control over it and all that is connected with it, by the Secretary of the Interior, is antagonistic to any law of the state or to any right or interest of his wife under that law. Of course, fifty acres of the land was unrestricted at the time of the modification of the lease, but we have heretofore called the court's attention to the fact that all of the land, so far as the lease and oil and gas operations thereunder are concerned, is still restricted, and subject to the jurisdiction of the Secretary of the Interior, until provision has been made for the segregation provided for by the regulations of the Secretary of the Interior, and which, admittedly, has never been done. We submit that the regulation means more than merely the right of the Secretary to collect the revenues, in the event the parties have not agreed otherwise, as the opinion suggests. We do not insist that restrictions are reimposed on the land, but the regulation specifically provides that until the parties have agreed for a separate accounting, "the entire lease shall continue subject to approval and supervision of the Secretary of the Interior." The Secretary, therefore, may not only collect royalties,

a function which would limit his authority to that of a mere agency, but the operation of the lease is still subject to his control, and he may even cancel it for failure to comply with its provisions. His control of the lease remains the same as before the removal of the restrictions. The argument does not require an assumption that restrictions have been reimposed, for the removal of restrictions against alienation, does not remove the Secretary's continued control over the lease the same as before, provided, of course, the
140 validity of the regulation is conceded, which we do not understand to be disputed.

It has not been pointed out where and in what manner Congress has consented to the limitation suggested, except by the following statement in the opinion:

"This court will take judicial notice that a large portion of the citizens of the Territory of Oklahoma and the Indian Territory who framed the Constitution of Oklahoma were Indians who owned their own homes and lands and that this provision of the Constitution was undoubtedly placed in the Constitution by such Indian citizens for their own protection. This, we think, is a legitimate argument to make in favor of the proposition that Congress never intended by law or regulation to deprive any Indian or other allottee in Oklahoma of the benefit of the homestead and exemption laws of the state."

The argument overlooks, we respectfully submit, the somewhat obvious fact, that Indians could not in that way, i. e., by the mere exercise of suffrage, curtail the powers or affect the policy, of the national government, acting through the Interior Department, relative to such Indians, their lands and property. The uniform practice of the Secretary of the Interior since statehood, may be considered in this connection, as an aid in arriving at the meaning and purpose of the Acts of Congress, for the regulations of the Secretary are administrative of such Acts, and partake of their legal force. Blansett v. Cardin, 256 U. S. 326. We understand that that practice has been to approve a lease executed by the allottee of restricted lands, regardless of any question of state homestead. How many such leases are in existence, and which have been, and are now being, operated for oil and gas, and which may be affected by this decision, we, of course, have no means of knowing. Among the many thousands of leases so approved, there is bound to be a considerable number in which the decision in the case at bar may mean financial disaster for the lessee.

141 Second.

Because the marriage of Pearl and Webster Chisholm and their occupancy of the land could not legally have the effect of divesting the parties to a valid, existing lease, of the right to have the same modified, with the approval of the Secretary of the Interior—a right which is recognized by the lease itself, and by the regulations of the

Secretary, which are a part of it and to which it is subject, and vested in the parties to such lease at the time of the marriage, and occupancy of the land.

The original term of the lease expired May 14th, 1919. The lessees remained in possession after that date, operating the land for oil and gas, and had been paying, ever since March 9th, 1914, the increased royalty, as a condition of the modification of such lease. It is said that Pearl Chisholm did not know of such modification and extension, and the court calls attention to the fact that there was no provision in the original lease, stipulating for an extension or renewal thereof. We infer from this statement that if it had contained such a provision or condition, she would have been bound thereby, and her consent to such renewal would not have been necesary. But the lease, in the first paragraph, provides that it is subject to the regulations prescribed by the Secretary of the Interior, under the authority conferred on him by Congress. One of these regulations is found at page 92 of the transcript, and provides:

"Appropriate changes will be made in the lease form to provide and carry into effect the provisions of the above modified regulations and such modifications of the regulations and lease form shall be effective May 1, 1911, and may, at the option of the parties, be incorporated in leases hereafter executed prior to that date. Said modified provisions may also be substituted in any lease, executed prior to said date on forms now or heretofore in use, in lieu of corresponding provisions contained in such leases, upon formal stipulations by the parties to that effect, when duly approved by the Secretary of the Interior. All leases which embrace the said provision, whether in original form or by substitution, shall be subject to these regulations."

142

The parties to this lease were therefore granted the option, and had a vested right, to have it modified by formal stipulation to that effect, with the approval of the Secretary of the Interior, and this right existed prior to the marriage between Webster and Pearl Chisholm. The latter was therefore bound, as a matter of law, to know that her husband, when she married him, and moved on the land, had the right to execute such a stipulattion. Whether she knew of the contract of modification or not, she could not interfere with the exercise of the right to have it so modified. The opinion does not discuss, or pass upon, our contention that, regardless of her actual knowledge, she is conclusively charged with notice of the renewal—just as much and in the same way as she is charged with notice of the lease itself—a renewal made in pursuance of the power, right and authority existing at the time of the marriage.

Act Cong., App. March 1, 1907, 34 Stat. L. 1026;
Scioto Oil Company v. O'Hern, 169 Pac. 483;
Anicker v. Gunsburg, 226 Fed. 176;
Anicker v. Gunsburg, 246 Fed. 110;
Anchor Oil Co. v. Gray, — U. S. —, 257 Fed. 277.

Wherefore, upon the foregoing grounds, the appellants respectfully pray this honorable court to grant them a rehearing in said cause.

ALVIN RICHARDS,
PRESTON C. WEST,
ROGER S. SHERMAN,
GREY MOORE,
A. A. DAVIDSON,
Solicitors for Appellants.

143 I, A. A. Davidson, one of the solicitors and attorneys for appellants, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that the same is not interposed for delay.

A. A. DAVIDSON.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 16, 1922.

144 (*Order Denying Petition for Rehearing, etc.*)

September Term, 1922.

Saturday, October 21, 1922.

The above cause was argued, submitted and decided at the May Term 1922 of this court. The appellants filed a motion for a rehearing. The United States, who are not parties to the cause subsequently filed a motion for leave to file brief as amicus curiæ in support of the motion of appellants. The Mid-Continent Oil and Gas Association, not a party to the cause filed a similar motion. Appellants have filed a motion for leave to re-argue the case orally upon the petition for rehearing. It is manifest that if one party is allowed to file a brief as amicus curiæ, all must be permitted to do so who apply and appellees will be entitled to answer.

This court has reached a decision, that it believes to be correct. The case is of such importance that it will eventually reach the Supreme Court in any event if the record shows error in our decision. Therefore, in view of the facts above recited and after due consideration of the several motions mentioned, it is ordered that said several motions be and they are hereby denied.

October 21, 1922.

(*Motion for Stay of Mandate.*)

To the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Come now Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America, appellants in the above styled and numbered cause, and move the court for a stay of mandate

herein for sixty days in order that they may perfect an ap-
145 peal to the Supreme Court of the United States from the final judgment of this court, and for grounds state and show to the court:

That on October 25, 1922, counsel for appellants were advised by the Clerk of this court that the petition of appellants for a rehearing herein had been, on October 21, 1922, denied, and that the mandate was due to issue in a short time; that counsel for appellants have been on this 26th day of October, 1922, advised by the Clerk by telegram that a copy of the order denying rehearing is being mailed to them but that same has not yet been received; that immediately upon learning that petition for rehearing had been denied counsel for appellants telegraphed the Clerk of this court that they desired to appeal the case to the Supreme Court of the United States and that an order of this court was desired staying the mandate for sixty days for that purpose.

It is further shown to the court that appellants desire to prosecute their appeal as speedily as may be and that they will proceed therewith at once and will not occasion any unnecessary delay, and that such appeal is not being prosecuted for the purpose of delay but in good faith; and that appellees are amply protected by the supersedeas bond already given herein and that appellants are ready, able and willing to give such further and other bond as may be required and same will be promptly furnished by the appellants.

That the question involved in this cause is of grave importance to appellants apart from the mere loss of the particular property involved in the instant controversy, and is likewise of wide public importance because of its effects upon all restricted Indian lands in the state of Oklahoma occupied by the Indian allottees and their spouses as a homestead; and that counsel for appellants believe their appeal to be meritorious.

Wherefore, appellants pray that this court make and enter an order staying the mandate herein for sixty days to the end that appellants may have sufficient time to perfect their appeal to the Supreme Court of the United States and file their record in said court, and
146 furnish such additional bond as may be required; and that the court make such further order as shall be deemed necessary or proper.

ALVIN RICHARDS,
PRESTON C. WEST,
ROGER S. SHERMAN,
A. A. DAVIDSON,
GREY MOORE,
Solicitors for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 28, 1922.

(Order Staying Issuance of Mandate Until December 4, 1922, etc.)

September Term, 1922.

Tuesday, November 7, 1922.

Upon consideration of the motion of appellants for a stay of the mandate herein for sixty days in order that they may perfect an appeal to the Supreme Court of the United States from the decree of this Court, it is ordered that the issuance of the mandate of this Court be, and the same is hereby, stayed until and including December 4th, 1922; the mandate however, will not be longer stayed under this order should an appeal to the Supreme Court of the United States be allowed the appellants before the expiration of the stay hereby granted.

November 7th, 1922.

(Petition for Appeal to Supreme Court U. S.)

Now come Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America, appellants in the above cause, (defendants in the trial court) by their attorneys, Alvin Richards and Preston C. West, and feeling themselves aggrieved by the final judgment and opinion of this court entered against them and
147 in favor of the appellees, Pearl Chisholm and Webster Chisholm, (plaintiffs in the trial court), wherein and whereby the final decree of the District Court of the United States for the Eastern District of Oklahoma was affirmed by this court, hereby pray that an appeal may be allowed to them from the said judgment and opinion of this court to the Supreme Court of the United States, and in connection with this petition, the petitioners herewith present their assignment of errors.

And in connection with this petition for appeal, your petitioners further state and show that the decree and judgment of the Circuit Court of Appeals for the Eighth Circuit is not made final by the statutes of the United States in such cases made and provided, and that the matter in controversy exceeds the sum of One thousand ($1,000.00) dollars besides costs, as fully appears upon the face of the record in said cause.

Petitioners further pray that an order of supersedeas may be entered herein pending the final disposition of the matter, and that the amount of security may be fixed by the order allowing this appeal.

ALVIN RICHARDS,
PRESTON C. WEST.
Solicitors for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 20, 1922.

(Assignment of Errors on Appeal to Supreme Court U. S.)

Now come the appellants Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America (defendants in the trial court), by their solicitors, Alvin Richards and Preston C. West, and in connection with the petition for appeal, say that in the record and proceedings, and in the final opinion and judgment of this court, as well as in the final decree of the trial court,
148 manifest error has intervened, to the prejudice of the appellants, to-wit:

First. The United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the judgment and decree of the District Court of the United States for the Eastern District of Oklahoma.

Second. The United States Circuit Court of Appeals for the Eighth Circuit erred in denying the motion of appellants for rehearing herein.

Third. The United States Circuit Court of Appeals for the Eighth Circuit erred in declining and refusing to hold that the District Court of the United States for the Eastern District of Oklahoma erred in finding, holding and decreeing that plaintiffs were entitled to the immediate, full, complete and exclusive possession of the land involved in this suit and that appellant Oklahoma Producing and Refining Corporation of America has no right, title or interest therein for any purpose whatever and enjoining said appellants from interfering with plaintiffs in the exclusive possession of said premises.

Fourth. The United States Circuit Court of Appeals for the Eighth Circuit erred in declining and refusing to hold that the District Court of the United States for the Eastern District of Oklahoma erred in finding, holding and decreeing that the instrument executed by Webster Chisholm, dated March 9, 1914, extending in force the original lease dated May 14, 1904, was null and void and that the appellants had no right, title, interest or privilege in and to said lands by virtue thereof.

Fifth. The United States Circuit Court of Appeals for the Eighth Circuit erred in declining and refusing to hold that the District Court of the United States for the Eastern District of Oklahoma erred in not finding, holding and decreeing that the instrument executed by Webster Chisholm, dated March 9, 1914, extending in force the original lease of May 14, 1904, was good, valid and effectual to confer upon the original lessee and its assignees the oil and gas min-
149 ing rights in the lands covered by said lease and extension agreement, so long as oil or gas should be produced therefrom in paying quantities.

Sixth. The United States Circuit Court of Appeals for the Eighth Circuit erred in declining and refusing to hold that the District Court of the United States for the Eastern District of Oklahoma erred in

not finding, holding and decreeing that the instrument executed by Webster Chisholm, dated March 4, 1914, extending in force the original lease, dated May 14, 1904, was good, valid and effectual to confer upon the original lessee and its assignees the oil and gas mining rights in so much at least of the lands covered by said original lease, as constituted the thirty-acre Indian homestead portion of Webster Chisholm allotment, so long as oil or gas should be produced therefrom in paying quantities.

Seventh. The United States Circuit Court of Appeals for the Eighth Circuit erred in declining and refusing to hold that the District Court of the United States for the Eastern District of Oklahoma erred in holding that the plaintiffs Webster Chisholm and Pearl Chisholm were not estopped by their acts and conduct, and by the receipt of the royalties under the extension agreement and extended lease, to question the validity of the original lease as modified thereby.

Eighth. The United States Circuit Court of Appeals for the Eighth Circuit erred in refusing to hold that plaintiffs Webster Chisholm and Pearl Chisholm were estopped by their acts and conduct and by the receipt of royalties under the extension agreement and extended lease, to question the validity of said extension agreement or the extension of the original lease as modified thereby.

Ninth. The United States Circuit Court of Appeals for the Eighth Circuit erred in declining and refusing to reverse the final judgment and decree of the District Court of the United States for the Eastern District of Oklahoma, and declining and refusing to remand this cause to said court with directions to enter a decree for ap-
150 pellants (defendants below) dismissing complainants' bill.

Wherefore, appellants pray that the said opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed, and that this cause be ordered remanded to the District Court of the United States for the Eastern District of Oklahoma, with directions to enter a decree for appellants (defendants below), dismissing complainants' bill.

ALVIN RICHARDS,
PRESTON C. WEST,
Solicitors for Petitioners.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 20, 1922.

(*Præcipe for Transcript on Appeal to Supreme Court U. S. and Consent to Granting of Supersedeas.*)

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled cause for the use of the Supreme Court of the United States and to be filed in the said the Supreme Court of the United States, pursuant to an appeal al-

owed in said cause, and to include in such transcript of the record the following, and no other, papers, to-wit:

1. The bill of complaint, answers of all the answering defendants and reply of plaintiffs.

2. Petition for removal, bond for removal and order of removal from the District Court of Tulsa County, state of Oklahoma, to the District Court of the United States for the Eastern District of Oklahoma.

3. Appellants' condensed statement of evidence at the final hearing as the same appears in the printed record of this case now on file in this court, pages 33 to 112 of said printed record.

4. Substitute opinion of the Judge of the District Court of
151 the United States for the Eastern District of Oklahoma as same appears in the printed record of this case now on file in this court, at pages 20 to 27 of said printed record.

5. Final decree of the District Court of the United States for the Eastern District of Oklahoma for the plaintiffs and against the defendants and adjudging the stipulation of Webster Chisholm dated March, 9, 1914, extending in force the original lease of May 14, 1904, null and void, and enjoining the defendants from interfering with plaintiffs in the full and exclusive possession of the premises involved.

6. Assignment of error on appeal from the District Court of the United States for the Eastern District of Oklahoma to the United States Circuit Court of Appeals for the Eighth Circuit.

7. Opinion of the United States Circuit Court of Appeals for the Eighth Circuit affirming decree of the District Court of the United States for the Eastern District of Oklahoma.

8. Petition of appellants for rehearing in this court.

9. Order and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, denying petition for rehearing.

10. Petition for allowance of appeal from the United States Circuit Court of Appeals for the Eighth Circuit to the Supreme Court of the United States.

11. Assignment of errors on appeal from the United States Circuit Court of Appeals for the Eighth Circuit to the Supreme Court of the United States.

12. Order allowing appeal.

13. Citation with service.

14. Certificate of Clerk of the Court.

152

ALVIN RICHARDS,
PRESTON C. WEST,
Solicitors for Appellants.

We, the undersigned, solicitors and counsel for the complainants herein, Webster Chisholm and Pearl Chisholm, do hereby acknowledge receipt of the above designation of parts of the record necessary for the consideration of the errors assigned by appellants (defendants in the trial court), Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America, and waive the designating of any other parts of the record, and agree that the above includes all the portions of said record material or necessary for the consideration of the errors assigned, and that any of the Judges of the United States Circuit Court of Appeals for the Eighth Circuit may sign an order fixing the supersedeas bond herein of the sum of Fifteen thousand ($15,000.00) dollars, and allow the same to act as a supersedeas as well as a bond for damages and costs.

Dated this 3rd day of November, A. D. 1922.

J. HOWARD LANGLEY,
HARVE N. LANGLEY,
S. R. LEWIS,
O. S. BOOTH,
Solicitors for Complainants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 20, 1922.

153 (*Order Allowing Appeal to Supreme Court U. S. and Granting Supersedeas.*)

On Motion of Preston C. West, Esquire, Solicitor and counsel for appellants above named, (defendants in the trial court), Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America,

It is hereby Ordered that an appeal to the Supreme Court of the United States from the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit herein, affirming the final judgment and decree of the District Court of the United States for the Eastern District of Oklahoma herein, be, and the same is hereby, allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said the Supreme Court of the United States.

And it is further ordered That the bond on appeal be, and the same is hereby fixed at the sum of Fifteen thousand ($15,000.00) dollars and that the same act as a supersedeas bond and also as a bond for costs and damages on appeal.

WALTER H. SANBORN,
U. S. Circuit Judge in and for the Eighth Circuit.

November 20, 1922.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 20, 1922.

154 (*Supersedeas Bond on Appeal to Supreme Court U. S.*)

Know all men by these presents, That we, Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America, as principals, and American Indemnity Company, Galveston, Texas as sureties, are held and firmly bound unto Pearl Chisholm and Webster Chisholm in the sum of Fifteen thousand ($15,000.00) dollars lawful money of the United States of America, to be paid to them and their respective representatives, administrators and successors; to such payment well and truly to be made, we bind ourselves and each of us, jointly and severally and each of our heirs executors, administrators and successors, by these presents.

Sealed with our seals and dated this 9th day of November, 1922.

Whereas, The above named Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America, have prosecuted an appeal to the Supreme Court of the United States to reverse the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit and the final judgment and decree of the District Court of the United States for the Eastern District of Oklahoma, in the above entitled cause;

Now, herefore, the condition of this obligation is such that if the above named Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America shall prosecute their said appeal to effect and answer all damages and costs, if they fail to make their appeal good, then this obligation shall be void: otherwise to remain in full force and effect.

In Witness whereof we have hereunto set our hands and seals the day and year last above written.

SPERRY OIL & GAS COMPANY,
By T. O. LILYSTRAND,
Vice President.

Attest:
[SEAL.] ALVIN RICHARDS.

155 OKLAHOMA PRODUCING AND REFINING CORPORATION OF AMERICA,
By H. N. COLE,
Vice Pres.,
Principals.

Attest:
[SEAL.] L. P. HARRINGTON.

[SEAL.] AMERICAN INDEMNITY COMPANY,
By H. S. SHELOR,
Attorney-in-fact,
Sureties.

Approved: November 20, 1922.
WALTER H. SANBORN,
U. S. Circuit Judge in and
for the Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 20, 1922.

156 *Citation.*

UNITED STATES OF AMERICA:

To Pearl Chisholm and Webster Chisholm, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from and after the date hereof, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the Sperry Oil and Gas Company and Oklahoma Producing and Refining Corporation of America, are Appellants, and you are Appellees, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, Senior United States Circuit Judge in and for the Eighth Circuit, this twentieth day of November, A. D. 1922.

WALTER H. SANBORN,
Senior United States Circuit
Judge for the Eighth Circuit.

Service of the above citation is hereby accepted this 27th day of November, 1922.

LANGLEY & LANGLEY AND
S. R. LEWIS,
By O. S. BOOTH,
O. S. BOOTH,
Solicitor for Appellees.

[Endorsed:] No. 6017. Sperry Oil and Gas Company, et al., Appellants, vs. Pearl Chisholm, et al. Citation on Appeal to Supreme Court, U. S., and acceptance of service. Filed Nov. 29, 1922. E. E. Koch, Clerk.

157 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress approved February 13, 1911, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in ac-

cordance with the præcipe of counsel for appellants, in a certain cause in said Circuit Court of Appeals wherein Sperry Oil and Gas Company, et al., were Appellants, and Pearl Chisholm, et al., were Appellees, No. 6017, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of service endorsed thereon is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this first day of December, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 29,281. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 731. Sperry Oil & Gas Company and Oklahoma Producing & Refining Corporation of America, appellants, vs. Pearl Chisholm and Webster Chisholm. Filed December 12th, 1922. File No. 29,281.

[redacted]

IN THE

Supreme Court of the United States

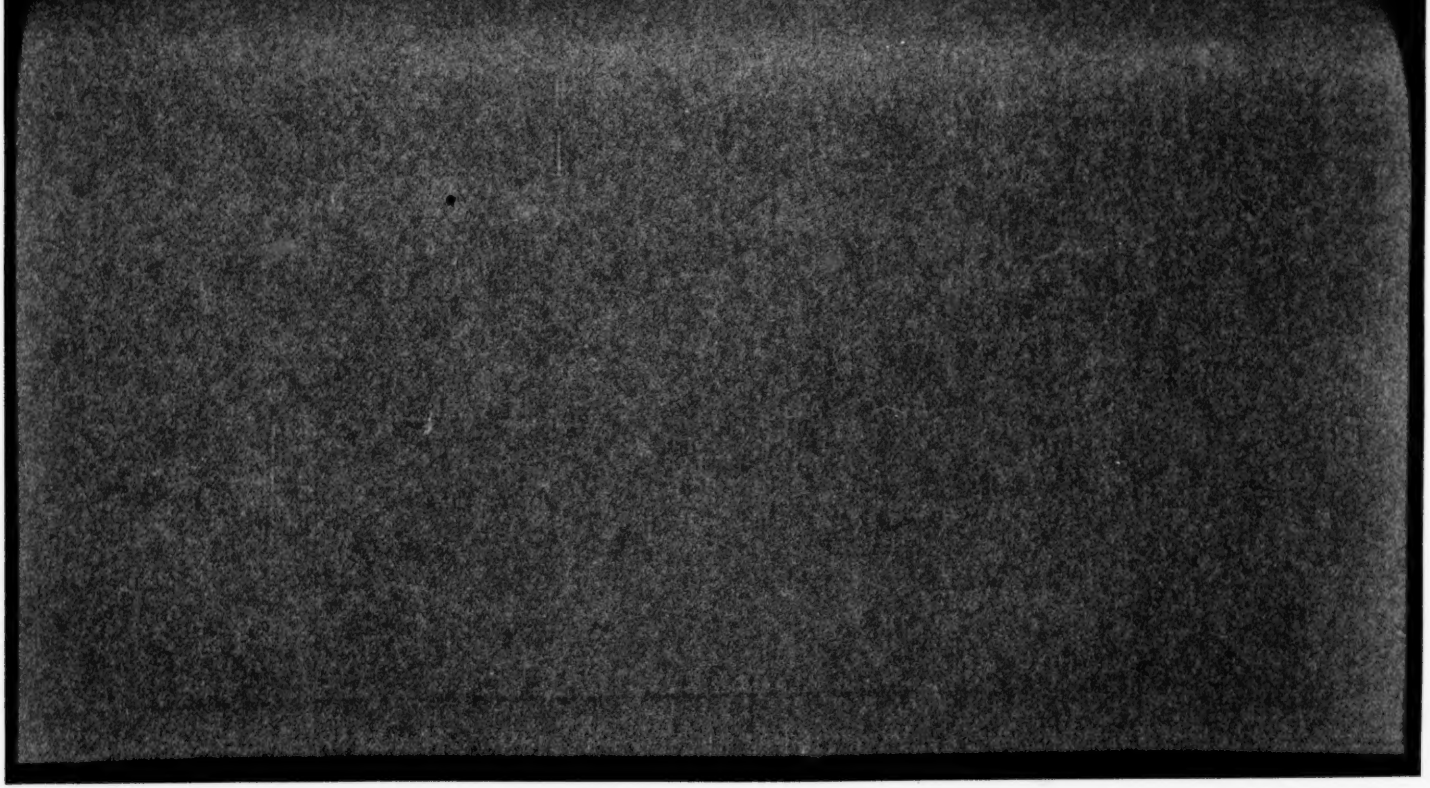
[redacted]

[redacted]

[redacted]

[redacted]

[redacted]



INDEX.

PAGE

Petition for *Certiorari*. 1

Ex. A—Opinion of Circuit Court of Appeals 13

Ex. B—Order Circuit Court of Appeals denying motion for leave to reargue. 28

Brief on Behalf of Petitioners. 29

Statement. 29

Specification of Errors. 39

Brief of Argument. 40

The importance of the questions involved in this controversy is sufficient to demand an examination by this court of the entire record and all proceedings had in the Circuit Court of Appeals by *certiorari*. 40

The entire allotment of Webster Chisholm was his separate and distinct property and he had the right to deal with it as he wished without restraint from his wife or without restraint of the Oklahoma Homestead Law, and his right to lease the same was governed solely by the Acts of Congress and rules and regulations of the Secretary, and the supplemental or substituted lease of May 14, 1914, having been executed according to the Acts of Congress and such rules and regulations, was valid in every respect. 44

The question to be decided, as stated by the Circuit Court of Appeals in their opinion and their comment thereon. 53

The appellees are estopped to assert the invalidity of the supplemental or substituted lease by reason of their acceptance of the increased royalties and the benefits accruing to them thereunder. 61

As Webster Chisholm was the sole owner of the land, Pearl Chisholm under no view of the case could have anything but a homestead right of occupancy of which she has not been deprived, and having sought the aid of a court of equity such court can and should mold a remedy so as to protect such occupancy right without destroying the rights of petitioners..... 63

AUTHORITIES CITED. PAGES

Act July 1, 1902, 32 Stat. L. 716.....3, 31, 44
Act June 16, 1906, 34 Stat. L. 267.....35, 48
Act March 1, 1907, 34 Stat. . 1015.....47, 61
Act May 27, 1908, 35 Stat. L. 312.....3, 32, 45
Constitution of Oklahoma, Arts. 1 and 12....35, 48
Regulations Secretary of the Interior, May 1, 1911.....5, 32, 33, 46, 47
Revised Laws of Oklahoma, 1910, Secs. 1143, 1150, 3342, 3343.....35, 49, 50, 62
Anicker v. *Gunsburg*, 246 Fed. 110.....61
Anicker v. *Gunsburg*, 226 Fed. 176.....61
Anchor Oil Co. v. *Gray*, 256 U. S. 519, 257 Fed. 277.....61
Ashton v. *Noble*, 46 Okla. 297, 148 Pac. 1042..52, 57
Armstrong v. *Letty*, .. Okla. ..., 209 Pac. 168..52
Blansett v. *Cardin*, 256 U. S. 319.....9, 10, 51, 58
Brusha, et al., v. *Bd. of Ed.*, 41 Okla. 595, 139 Pac. 298.....63
Chapman v. *Siler*, 30 Okla. 714, 120 Pac. 608....57
Crosby v. *Partridge*, 205 Pac. 758.....52
Daniels v. *Tierney*, 102 U. S. 415.....63
Deming Investment Co. v. *U. S.*, 224 U. S. 471, 56 Law. ed. 847.....51
Ex parte Young, 209 U. S. 123, 52 Law. ed. 714..43
Fairbanks v. *United States*, 181 U. S. 283, 309, 45 Law. ed. 862.....42
F. B. Collins Investment Co. v. *Beard*, 46 Okla. 310, 148 Pac. 846.....52

Goat v. *U. S.*, 224 U. S. 458, 56 Law. ed. 841.....51
Heckman v. *U. S.*, 224 U. S. 413, 56 Law. ed. 820..51
In re Allen's Will, 44 Okla. 392, 144 Pac. 1055....52
Jefferson v. *Winkler*, 26 Ok. 653, 110 Pac. 755..51, 56
Jennings v. *Wood*, 192 Fed. 507, 122 C. C. A. 657..53
Kenny v. *Miles*, 250 U. S. 58, 63 Law. ed. 841....51
Kirkpatrick v. *Burgess*, 29 Okla. 121, 116 Pac. 764.....51, 56
La Mott, et al., v. *United States*, 254 U. S. 570....51
Malone v. *Wamsley*, 80 Okl. 181, 195 Pac. 484..52, 57
Montana M. & M. Co. v. *St. Louis M. & M. Co.*, 204 U. S. 204, 51 Law. ed. 444.....43
Mullen v. *U. S.*, 224 U. S. 448, 56 Law. ed. 834....51
Parker v. *Richard*, 250 U. S. 235.....51
Pennoyer v. *McConnaughy*, 140 U. S. 1, 23, 35 Law. ed. 363, 370.....42
Pomeroy, Eq. Juris., Vol. 2, Sec. 802.....62
Pullman's Palace Car Co. v. *Central Transportation Co.*, 171 U. S. 138, 43 Law. ed. 108....43
Scioto Oil Co. v. *O'Hern*, .. Okl. .., 169 Pac. 483..61
St. Louis Ry. Co. v. *Wabash Ry. Co.*, 217 U. S. 247, 54 Law. ed. 752.....43
Tiger v. *Western Investment Co.*, 221 U. S. 286, 55 Law. ed. 738.....51, 56
Truskett v. *Closser*, 236 U. S. 223, 59 Law. ed. 549.....51, 56
Union Pacific Railroad Co. v. *Weld County*, 247 U. S. 282, 62 Law. ed. 1110.....43
United States v. *Alabama Great Southern Ry.* Co., 142 U. S. 615, 35 Law. ed. 1134.....42
United States v. *Philbrick*, 120 U. S. 52, 30 Law. ed. 559.....42
United States v. *Heatley*, 160 U. S. 136, 40 Law. ed. 369.....42
Walker v. *Brown*, 43 Okla. 144, 141 Pac. 681..52, 57
White v. *Sallee*, 208 Pac. 214.....52
Wilson v. *Morton, et al.*, 29 Okla. 475, 119 Pac. 213.....51, 57

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. .....

SPERRY OIL & GAS COMPANY AND OKLAHOMA PRODUCING AND REFINING CORPORATION OF AMERICA, *Petitioners,*

vs.

PEARL CHISHOLM AND WEBSTER CHISHOLM, *Respondents.*

PETITION *for CERTIORARI.*

To the Honorable the Supreme Court of the United States:

Your petitioners, Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America, respectfully state and show to this court:

That this suit was instituted by plaintiffs, Pearl Chisholm and Webster Chisholm, in the District Court of Tulsa County, State of Oklahoma, for the purpose of having an oil and gas mining lease made by Webster Chisholm, a Cherokee Indian of the half-blood, and the allottee of the land involved, pursuant to the laws of the United States and the rules

and regulations of the Secretary of the Interior, and a certain extension agreement whereby the original lease was modified and extended, the said extension agreement being also made under the rules of the Secretary, declared null and void and canceling the same, and of obtaining a decree enjoining defendants (who are petitioners here) from asserting any further claim to the land covered by said lease and extension agreement; and to recover for oil and gas that had been extracted from the land.

Defendants (who are the petitioners here) by their answers relied upon the oil and gas lease and the extension agreement, so made by the allottee pursuant to the laws of the United States and the rules and regulations of the Secretary of the Interior, and approved by the Secretary, being the same instruments as to which plaintiffs were seeking cancelation. They also set up the defense of estoppel because plaintiffs had voluntarily and with knowledge accepted and retained all royalties and benefits under the lease and extension thereof.

The cause was in apt time removed to the District Court of the United States upon the ground that the controversy presented a federal question and required a consideration and construction of the laws of the United States with respect to the allotment of the lands of the Cherokee Nation and the rules and regulations of the Secretary of the Interior governing the leasing of such allotted land for oil and gas mining purposes.

And the jurisdiction of the court was based under statutes of the United States and particularly under the statute entitled "An Act to Provide for the Allotment of the Lands of the Cherokee Nation, for the Disposition of Townsites therein, and For Other Purposes" (32 Stat. 716), and the statute entitled "An Act for the Removal of Restrictions from Part of the Lands of Allottees of the Five Civilized Tribes, and For Other Purposes" (35 Stat. 312).

The facts are as follows:

Webster Chisholm was duly enrolled as a citizen of the Cherokee Nation of one-half Indian blood, Roll No. 30871. The eighty acres of land involved (S2 of SE4 Section 13 T 21 N R 12 E) was duly allotted to him, and thirty acres designated as "homestead" and fifty acres as "surplus," and separate patents issued therefor.

By the Cherokee Agreement (Act approved July 1, 1902, 32 Stat. 716) the entire allotment was restricted as to alienation, and by section 72 of that act is was provided:

> "Cherokee citizens may rent their allotments when selected * * * but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise."

And by section 65:

> "All things necessary to carry into effect the provisions of this Act not otherwise specifi-

cally provided shall be done under the authority and direction of the Secretary of the Interior."

May 14, 1904, Chisholm (being at that time an unmarried man) made an oil and gas lease covering his entire allotment. This lease was made with the approval and under the rules and regulations of the Secretary of the Interior. It describes the land as a single tract thus:

"The south half of the southeast quarter of section thirteen, township 21 north, range 12 east of the Indian Meridian, and containing eighty (80) acres, more or less."

The lease was for the term of fifteen years and contained the following, among other provisions:

"And the party of the second part agrees that this indenture of lease shall in all respects be subject to the rules and regulations heretofore, or that may hereafter be, lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation."

By Section 1 of the Act of Congress approved May 27, 1908 (35 Stat. 312), restrictions were removed from the fifty acres constituting Chisholm's "surplus" allotment but continued as to the thirty acres designated as "homestead;" and section 2 of that act privided:

"that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior, and not otherwise."

The Secretary of the Interior thereupon made the following rule:

> "In event restrictions are removed from a part of the land included in a lease for oil, gas or other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior, and all royalties thereunder shall be paid to the Indian Agent until such time as the lessor and lessee shall furnish the Secretary of the Interior satisfactory information that adequate arrangements have been made to account for the oil, gas, or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulations provided."

No steps were ever taken to remove any part of the land from the supervision of the Secretary, and by the terms of this regulation, the "entire lease" continued "subject to approval and supervision of the Secretary of the Interior," and royalties have at all times been paid to the superintendent.

A further regulation of the Secretary effective May 1, 1911, provided:

> "Appropriate changes will be made in the lease form to provide and carry into effect the provisions of the above modified regulations and such modifications of the regulations and lease form shall be effective May 1, 1911, and may, at the option of the parties, be incorporated in leases hereafter executed prior to that date.

Said modified provisions may also be substituted in any lease, executed prior to said date on forms now or heretofore in use, in lieu of corresponding provisions contained in such leases, upon formal stipulations by the parties to that effect, when duly approved by the Secretary of the Interior. All leases which embrace the said provision, whether in original form or by substitution, shall be subject to these regulations."

October 11, 1911, Webster Chisholm married Pearl Chisholm. She never had any title to the land involved nor any interest in her own right in the oil or gas under it. April 12, 1912, Webster and Pearl Chisholm took up their actual residence on his allotment. They built a house and barn on the tract designated as "homestead" (which was and still is restricted as to alienation) and have lived there continuously since. The "surplus" has no improvements on it other than fences and was used in connection with the other land chiefly for pasturage. Several producing wells had already been drilled upon the premises when the Chisholms moved thereon. Other wells were drilled while they resided on the land. Altogether eleven wells were sunk, some on the homestead and some on the surplus. This was all done with the knowledge and acquiescence of the Chisholms. All the royalties were paid through the Indian Superintendent and Webster Chisholm used them, in part at least, for the support of his family.

March 9, 1914, Webster Chisholm executed (without his wife joining) a stipulation modifying

the term of the original lease as to the whole eighty acres, so as to make the lease conform to the new lease form prescribed by the Secretary of the Interior under his amended regulations of February 6, and June 29, 1911. This stipulation was approved by the Secretary. Thereafter royalties were paid at the rate of twelve and one-half (12½) per cent instead of ten (10) per cent as had been fixed in the original lease. This stipulation modified also the term of the lease so as to make it "for ten years and as long as oil or gas should be found in paying quantities." Five of the wells on the premises were drilled after Webster Chisholm executed this stipulation.

The trial court gave judgment for the plaintiffs and enjoined defendants (petitioners here) from further operating for oil and gas. The case was taken up by appeal to the Circuit Court of Appeals for the Eighth Circuit, and that court affirmed the decree of the trial court (282 Fed. 93), holding that under Oklahoma Enabling Act of June 16, 1906, Section 21 of the Constitution of Oklahoma, Article 12, Sections 1 and 2, and Revised Laws of Oklahoma 1910, Sections 1143, 3342, 3343, the stipulation extending and modifying the original oil and gas lease, executed by the husband alone, without the wife joining therein, was void, although the husband was an Indian allottee and the land embraced his restricted Indian homestead allotment, and notwithstanding that the Act of July 1, 1902, Section 72, and the Act of May 27, 1908, Sections 1 and 2, provided that the

allottee might lease such lands with the approval of the Secretary, and though the stipulation extending and modifying the lease was made pursuant to the rules and regulations of the Secretary of the Interior and duly approved by the Secretary.

A copy of the opinion of the Circuit Court of Appeals is attached to this petition marked Exhibit "A."

The Circuit Court of Appeals also on October 21, 1922, denied a petition for rehearing, and a true copy of its final order and judgment denying the petition for rehearing is attached hereto marked Exhibit "B."

The decision in the Circuit Court of Appeals turned upon the question of whether, notwithstanding Section 72 of the Cherokee Agreement, (Act of July 1, 1902, 32 Stat. 716) and Section 2 of the Act of May 27, 1908 (35 Stat. 312), providing that leases of restricted lands for oil and gas mining purposes "may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise," a stipulation extending and modifying an existing oil and gas mining lease, by an allottee, made under rules and regulations prescribed by the Secretary, and approved by the Secretary must, to be valid, be joined in by the spouse of the allottee where the lands embraced were occupied as a homestead, because by the state laws (Revised Laws of 1910, Section 1143) it is declared that no deed, mortgage, or

contract relating to the homestead "shall be valid unless in writing and subscribed by both husband and wife." Or, as stated by that court:

> "The ultimate question presented is whether the laws of Oklahoma relating to the conveyance of the homestead as defined by said laws are repugnant to the laws of Congress regulating the leasing of restricted Indian lands; and whether 'restricted' means in this connection, lands that were non-alienable for the period of twenty-five years from the date of allotment."

In reaching the conclusion that because the lands involved were occupied as a homestead, the allottee could not make a valid stipulation modifying and extending a lease that was executed under the regulations of the Secretary, and approved by him, unless the wife joined therein, the Circuit Court of Appeals undertook to distinguish the case of *Blansett* v. *Cardin*, 256 U. S. 319, in which this court held that under Act of Congress of June 25, 1910 (36 Stat. 816) as amended February 14, 1913 (37 Stat. 678) a married Indian allottee could, with the approval of the Secretary, make a valid will of all her allotted land, though a state statute of Oklahoma provided that no married woman should devise more than two-thirds of her property away from her husband, and another state statute undertook to confer on the surviving husband the right "to possess and occupy the whole homestead."

Your petitioners are advised that the Circuit Court of Appeals was in error in affirming the judg-

ment of the trial court, but should have reversed said judgment and order and ordered the bill of complainants dismissed, upon the authority of the decision of this court in *Blansett* v. *Cardin, supra.*

That the Circuit Court of Appeals erred in its decision in making the statutes of Oklahoma requiring the joinder of the wife in contracts relating to the homestead, superior and paramount to the Acts of Congress, permitting restricted Indian allottees to make oil and gas mining leases with the approval of the Secretary of the Interior; and such holding is destructive of the right conferred by the Act approved July 1, 1902, Section 72 (32 Stat. 716), and Act approved May 27, 1908, Section 2 (35 Stat. 312).

That the Circuit Court of Appeals erred in holding that the instrument executed by Webster Chisholm March 9, 1914, pursuant to the rules and regulations of the Secretary of the Interior, and approved by the Secretary, modifying and extending in force the original lease of May 14, 1904, was null and void and that appellants (petitioners here) had no right, title, interest or privilege in the lands by virtue thereof.

That the Circuit Court of Appeals erred in holding that the plaintiffs were not estopped to question the validity of said stipulation of March 9, 1914.

Your petitioners present herewith, as part of this petition, a transcript of the record of the Circuit Court of Appeals. Also a printed brief in support of this application.

Wherefore, Your petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in this case, which was entitled in that court, to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate and that the said judgment of the said Circuit Court of Appeals may be reversed by this honorable court.

SPERRY OIL & GAS COMPANY,
OKLAHOMA PRODUCING AND REFINING CORPORATION OF AMERICA,
By ALVIN RICHARDS,
PRESTON C. WEST,
Their Solicitors.

State of Oklahoma, County of Tulsa—ss:

I, Preston C. West, having been first duly sworn upon oath state: That I am one of the solicitors for the petitioners herein, and as such had personal charge of the cause in the foregoing petition mentioned in the Circuit Court of Appeals; that I prepared the foregoing petition and that the allegations thereof are true as I verily believe.

PRESTON C. WEST,

Subscribed and sworn to before me this 11th day of December, A. D. 1922.

(Seal) ANNA GOLLODAY BELL,
Notary Public.

My commission expires November 25, 1925.

Respondents hereby acknowledge receipt of copy of the foregoing petition, this 11th day of December, 1922, together with brief in support thereof.

PEARL CHISHOLM and
WEBSTER CHISHOLM,
By HOWARD LANGLEY,
HARVE N. LANGLEY,
S. R. LEWIS,
By O. S. BOOTH,
O. S. BOOTH,
Their Solicitors.

Exhibit A.

In the Circuit Court of Appeals for the Eighth Circuit. Sperry Oil & Gas Company, et al., Appellants, vs. Pearl Chisholm, et al., Appellees. No. 6017.

(OPINION CIRCUIT COURT OF APPEALS.)

1. *Indians 16 (3)—Indian allottee's lease of "homestead," not signed by wife, void, though approved by the Secretary of the Interior.* Under Oklahoma Enabling Act, June 16, 1906, Sec. 21, Const. Okla. Art. 12, Secs. 1, 2, and Rev. Laws Okla. 1910, Secs. 1143, 3342, 3343, a renewal of an oil and gas lease, executed by the husband on the homestead without the wife joining therein, was void, though the husband was an Indian allottee and the land was his "homestead allotment," within Act July 1, 1902, Sec. 72, and Act May 27, 1908, Secs. 1, 2, providing that allottee may lease such land with the approval of the Secretary of the Interior, and though such renewal was signed by the Secretary of the Interior, since such federal statutes are not repugnant to the laws of Oklahoma, relating to homesteads, and requiring leases to be signed by both husband and wife; the words "homestead" and "surplus" in allotments made to Indians, having been used merely to classify the lands, and the real homestead to which a citizen of the state is entitled being the homestead created by the state laws.

(Ed. Note—For other definitions, see Words and Phrases, First and Second Series, Homestead.)

2. *Evidence 11—Judicial notice taken that many citizens of Oklahoma who framed constitution were Indians.* The Circuit Court of Appeals will take judicial notice that a large portion of the citizens of the territory of Oklahoma and the Indian territory who framed the constitution were Indians who owned their own homes.

3. *Homestead 112—Husband and wife held not estopped to deny validity of oil and gas lease on homestead for failure of wife to join therein.* Where wife had no knowledge that oil and gas lease on homestead had been renewed by the husband, before the expiration of the original lease, and received no part of the royalties, and there was no showing that the lessees would have taken such lease but for the conduct of husband and wife, the husband and wife were not estopped from asserting the invalidity of the deed for failure of the wife to join therein.

Appeal from the District Court of the United States for the Eastern District of Oklahoma: Robert L. Williams, Judge.

Action by Pearl Chisholm and another against the Sperry Oil & Gas Company and another. Judgment for plaintiffs *(Chisholm* v. *Creek and Indiana Development Co.,* 273 Fed. 589) and defendants appeal. Affirmed.

Preston C. West of Tulsa, Okla. (Alvin Richards, A. A. Davidson, Roger S. Sherman and Grey Moore, all of Tulsa, Okla., on the brief), for appellants.

J. Howard Langley, of Pryor, Okla. (Harve N. Langley of Pryor, Okla., and S. R. Lewis and O. S. Booth, both of Tulsa, Okla., on the brief), for appellees.

Before CARLAND and KENYON, Circuit Judges, and JOHNSON, District Judge.

CARLAND, Circuit Judge: This is an appeal from a decree adjudging appellants to have no interest in or right of possession to the real estate hereinafter mentioned and enjoining them from interfering with appellees' full and exclusive possession thereof. The facts as found by the trial court are as follows:

> "That the real estate involved in this cause, viz., the south half of the southeast quarter of section 13, township 21 north, and range 12 east, situs in Tulsa County, Oklahoma, is the allotment of the plaintiff, Webster Chisholm, a half-blood Cherokee Indian, whose Cherokee citizen roll number is 30,871, said lands being regularly conveyed to him by the Cherokee Nation as his said allotment and distributive share of the tribal lands of said nation or tribe of Indians, and that, of the aforesaid 80 acres of land, the following parcel constitutes his tribal homestead allotment, viz: The west half of the southwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter of the southeast quarter of said section, township, range and county, and that the remainder of said 80 acres of land constitutes the tribal surplus allotment of said Webster Chisholm. That upon May 14, 1904, the plaintiff Webster Chisholm, whilst a single person, executed an oil and gas lease covering all of said 80 acres of

lands aforedescribed, in favor of defendant, Creek & Indiana Development Company, a corporation, said lease being duly approved by the Secretary of the Interior on May 4, 1905, and that said lessee entered upon said premises and explored and discovered oil in paying quantities; that the said lessee, Creek & Indiana Development Company, a corporation, thereafter, on July 18, 1914, sold and assigned its rights and interest in said lease unto the defendant Sperry Oil & Gas Company, a corporation; and that thereafter, on November 25, 1918, the said assignee, Sperry Oil & Gas Company, a corporation, sold and assigned its rights and interest in said lease unto the defendant Oklahoma Producing & Refining Corporation of America, a corporation, and that the last named assignee has continued to and is now operating said lease for oil and gas as afterward modified and attempted to be extended, and removing oil and gas from said lands. That the lease executed by the plaintiff, Webster Chisholm upon May 14, 1904, aforesaid, was made for a definite period of 15 years from its date, and that said lease expired, terminated and ended on May 14, 1919. That upon the 11th day of November, 1911, the plaintiffs, Webster Chisholm and Pearl Chisholm were legally married, and that the plaintiffs moved upon the lands involved in this cause in the spring of the year 1912, and then and there the state homestead status attached thereto, and that they have continuously and uninterruptedly since then and to this time occupied the aforedescribed land as their home and homestead under the state law. That neither of the plaintiffs have or possess any other real estate than that involved in this suit. That the plaintiffs have from their occupancy of said lands in the spring

of 1912 claimed the aforesaid land as their homestead, and that said lands have constituted their homestead under the Constitution and statute laws of Oklahoma from their occupancy thereof in the spring of 1912, and have so continued to be occupied by them as their homestead, and now constitutes the same and was such homestead at the time, the supplemental contract was executed by Webster Chisholm.

The court further finds that upon March 9, 1914, the plaintiff Webster Chisholm signed, executed and delivered unto defendant Creek & Indiana Development Company, a corporation, an instrument in writing under its terms extending in force, as long as oil or gas is found in paying quantities, the lease aforementioned, and that said instrument, under such terms extending in force as long as oil or gas is found in paying quantities the lease aforementioned (the lease so extended being dated May 14, 1904), increased the royalty from one-tenth of the total production to one-eighth of the total production; that said instrument providing for the extending in force and continuing the terms of the original lease dated May 14, 1904, was not executed by or joined in by the plaintiff Pearl Chisholm, his wife, but executed only by the said Webster Chisholm; that the said Pearl Chisholm, the then wife of the said Webster Chisholm, did not join the execution of said instrument, nor did she give her consent thereto, nor did she have any knowledge thereof, and that the said Pearl Chisholm had no knowledge of the existence of said instrument extending in force and continuing the terms of said lease until after May 14, 1919, and just prior to the beginning of this action; and the court further

> finds that the instrument dated March 9, 1914, extending in force and continuing the terms of the original lease aforesaid, is null and void, for the reason that the wife of the said Webster Chisholm, viz., the said Pearl Chisholm, did not join in the execution of the same."

There was no provision in the original lease stipulating for an extension or renewal thereof. The ruling of the trial court, holding the renewal lease void because Pearl Chisholm did not join therein, is assigned as error. The ultimate question presented is whether the laws of Oklahoma relating to the conveyance of the homestead as defined by said laws are repugnant to the laws of Congress regulating the leasing of restricted Indian lands; the word "restricted" meaning, in this connection, lands that were non-alienable for the period of 25 years from date of allotment. The laws of Congress providing for the leasing of restricted Indian allotments at the time of the lease of May 14, 1904, and the renewal thereof March 9, 1914, were as follows:

By the Cherokee Agreement (Act of Congress approved July 1, 1902, 32 Stat. 716), the allotment of Webster Chisholm was restricted as to alienation, and by section 72 of the said agreement it was provided:

> "Cherokee citizens may rent their allotments when selected for a term not to exceed * * * ; but leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes and

for mineral purposes may be made also with the approval of the Secretary of the Interior, and not otherwise."

By Section 1 of the Act of Congress approved May 27, 1908 (35 Stat. 312), the restrictions on the 50 acres embraced in the lease designated as surplus allotment were removed but the restrictions remained upon the 30 acres designated as a homestead allotment. Section 2 of the same act provided:

> "The leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior * * * and not otherwise."

The regulation of the Secretary of the Interior, where restrictions were removed from a part of the land included in a lease for oil, gas and other mineral purposes was as follows:

> "In event restrictions are removed from a part of the land included in a lease for oil, gas and other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior and all royalties thereunder shall be paid to the Indian Agent until such time as the lessor and lessee shall furnish the Secretary of the Interior satisfactory information that adequate arrangements have been made to account for the oil, gas, or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the

supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulations provided."

It does not appear that the lessor and lessee in the case now under consideration ever furnished the Secretary of the Interior satisfactory information that adequate arrangements had been made to account for the oil, gas or mineral upon the restricted land separately from that upon the unrestricted. The laws relating to the creation of a homestead and the conveyance thereof in the State of Oklahoma are as follows:

The Oklahoma Enabling Act, approved June 16, 1906, by Section 21, provided as follows:

> "* * * And all laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state except as modified or changed by this act or by the constitution of the state * * *" 34 Stat. 277.

The Constitution of the State of Oklahoma (article 12, Sec. 1) defines the homestead as follows:

> "The homestead of any family in this state, not within any city, town or village, shall consist of not more than one hundred and sixty acres of land which may be in one or more parcels, to be selected by the owner. * * * *That nothing in the laws of the United State, or any treaties with the Indian Tribes in the state, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the state.*" (Italics ours.)

The above section of the Constitution was also enacted into the Revised Statutes of Oklahoma of 1910, appearing as section 3343. Section 2 of Article 12, Constitution of Oklahoma, provides as follows:

> "The homestead of the family shall be, and is hereby, protected from forced sale for the payment of debts, except for the purchase money; * * * nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law."

Section 3342 of the Revised Laws of Oklahoma provides as follows:

> "The following property shall be reserved to the head of every family residing in the state exempt from attachment or execution and every other species of forced sale for the payment of debts except as hereinafter provided:
>
> *First:* The homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife."

At the time of the admission of the State of Oklahoma into the Union, there was in force section 880, Wilson's Revised Laws of Oklahoma of 1903, which contained the following language:

> " * * * And no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced, except to the extent hereinafter provided."

1. Section 1143, Rev. Laws of Oklahoma of 1910, contains this same provision, with the addition of the words "or legally separated," which laws were in force and effect at the time of the execution of the renewal lease of March 9, 1914. It clearly appears from the laws thus quoted that, so far as the laws of Oklahoma are concerned, the renewal lease was void. The question now presented is whether Section 72 of the Cherokee Agreement or section 1 of the Act of Congress approved May 27, 1908, *supra*, are repugnant to and inconsistent with the provisions of the laws of Oklahoma which declare that no deed, mortgage or contract relating to the homestead exempt by law shall be valid, unless in writing and subscribed by both husband and wife. Does the provision of the state law in regard to the conveyance or leasing of the homestead prevent or hinder in any way the Secretary of the Interior from exercising his full power and authority under the laws of Congress referred to? It appears to us that they do not. We cannot see why the provisions of both state and federal law may not be given full force. Both provisions have for their object the same ultimate result. If the renewal lease had been executed by Pearl Chisholm, it still would have been subject to the approval of the Secretary of the Interior; and it is nowhere claimed that the approval of the Secretary, standing alone, would make a contract between the contracting parties. A valid contract must have been made by the parties themselves

so that, when it was presented to the Secretary of the Interior for his approval, it might come in the form of a valid contract made between the parties, but subject to the approval of the Secretary before it should become effective. In the present instance the alleged contract came to the Secretary in the form of a lease, but void under the laws of Oklahoma. The Secretary's approval could not remedy the want of power in Webster Chisholm to make the lease. We think the case of *Jennings* v. *Wood, et al.*, 192 Fed. 507, 112 C. C. A. 657, decided by this court, is very much in point. In the case cited it was held that under section 72, heretofore quoted in this opinion, the approval of the Secretary would ont validate a lease which was invalid because the lessor was a minor and not competent to make it. In delivering the opinion of the court in the case cited, Judge Hook used the following language:

> "The jurisdiction of the Secretary of the Interior is only that expressed in the acts of Congress. He was not constituted the general guardian of the estates of the Indians in the sense in which that term is usually employed. Power was not conferred upon him to originate and make leases of allotted lands. That was left to the Indians subject to his approval in specified cases. If an Indian did not desire to lease, there was nothing for the Secretary to act upon; if he did, and the lease was for oil and gas, its validity depended on the approval of that official, but he was not one of the contracting parties. On the contrary, his connection with the transaction and his authority first arose

> after the minds of the contractors came together, and they must have been competent to make the contract submittted for approval. A disapproval was merely a veto. An approval which proceeds upon a consideration of the terms of the instrument offered and whether they are reasonably for the interests of the Indian was intended as an additional safeguard to his protection. It would not, however, reach back and supply or confirm the essential, legal prerequisites of a valid contract."

The present case is not similar to the case of *Blanset* v. *Cardin, et al.*, 261 Fed. 309, decided by this court and affirmed by the Supreme Court May 16, 1921, 256 U. S. 319, 41 Sup. Ct. 519, 65 L. ed. 590. In the *Blanset* case the regulations of the Secretary of the Interior authorized by Congress provided that an Indian married woman could by will dispose of all of her allotted land. A law of Oklahoma provided that no woman while married should bequeath more than two-thirds of her property away from her husband. It was decided that in that case the provisions of the law of Oklahoma restricting the right of a married Indian woman to dispose of her property by will was repugnant and inconsistent with the rights conferred by the regulations of the Secretary of the Interior. In such a case, of course, the conclusion reached by this court was correct, as the regulations of the Secretary of the Interior, having been made by the authority of Congress, had the force of law, and were deemed made for the protection of the Indians and

their property, during the period of restriction on alienation. By Section 1 of the Act of May 27, 1908, *supra*, the restriction on 50 acres of the land in controversy was removed, so at the time the renewal was made only 30 acres of the land were restricted and the Cherokee Agreement and the Act of 1908 only refer to restricted lands, therefore 50 acres were subject only to the laws of Oklahoma, and the renewal lease would be void as to those acres in any event, and we are of the opinion that it was void as to all, because the parties to the pretended renewal contract had no contract to present to the Secretary of the Interior for approval. We do not think the regulations quoted in this opinion as applicable to cases where part of the lands subject to an oil and gas lease have been removed, have the effect to reimpose a restriction which Congress had removed. We take the regulation to mean that, if the parties do not agree upon any other way for accounting for the oil, gas or mineral from the restricted lands separate from the unrestricted lands, they will be deemed to have consented that the Secretary of the Interior still shall have that duty to perform. Before the State of Oklahoma could be admitted to the Union, its Constitution, especially where the rights of the United States or of the Indian tribes in Oklahoma were concerned, had to be accepted by the United States. There was a provision of the Constitution of Oklahoma (section 1, Art. 12) that nothing in the laws of the United States or any treaties with the Indian Tribes in the state should deprive any

Indian or other allottee of the benefit of the homestead and exemption laws of the state.

2. This court will take judicial notice that a large portion of the citizens of the territory of Oklahoma and the Indian Territory who framed the Constitution of Oklahoma were Indians who owned their own homes and lands, and this provision of the Constitution was undoubtedly placed in the Constitution by such Indian citizens for their own protection. This we think is a legitimate argument to make in favor of the proposition that Congress never intended by law or regulation to deprive any Indian or other allottee in Oklahoma of the benefit of the homestead and exemption laws of the state. The use of the words "homestead" and "surplus" in allotments made to Indians was in order to classify the lands. The real homestead which a citizen of Oklahoma is entitled to is created by the laws of the state.

3. It is next claimed that appellees are estopped from claiming that the renewal lease is void. Webster Chisholm received all the royalties accuring in the original lease and the attempted extension thereof, but his wife, Pearl Chisholm, received no part thereof. The trial court found that after the expiration of the lease of May 14, 1904, which was May 14, 1919, the land produced $22,944.40 of oil for the period of about seven months, and Webster Chisholm received the stipulated royalty on this oil, and therefore the court denied him any portion of the value

of the oil, except the royalty. We do not think that an estoppel as to the land can be urged against the appellees, for the reason that Pearl Chisholm, the wife of Webster Chisholm, had no knowledge of the renewal lease dated March 9, 1914, no knowledge of the operation of the lessee under the same, and in no way directly or indirectly encouraged the lessee in such operation. Appellants obtained this renewal lease more than five years before the expiration of the original lease. Any operations of the appellants in the production of oil would not attract the attention of any one knowing that the original lease did not expire until 1919. In addition to the lack of knowledge on the part of Pearl Chisholm, against whom estoppel is urged, there is an entire absence of evidence on the part of appellants that they would not have done the things they did, but for the conduct of the parties sought to be estopped.

Counsel for appellants further urged that, in case the court should be of the opinion that the renewal lease was void, and that the appellants are not estopped, the court, as a court of equity having full control of the case, ought to mold the relief so as to give appellees the possession of their homestead, but still at the same time grant to the appellants the right to extract oil under the renewal lease, as that would not interfere with the homestead rights of appellees. If the renewal lease is void, and we decide that it was and is, this court has no power to confer any rights upon the appellants and thus violate on its part the laws of Oklahoma.

We are clearly of the opinion that the judgment of the lower court holding the renewal lease void, was correct, and its judgment is affirmed.

Exhibit B.

In the United States Circuit Court of Appeals for the Eighth Circuit. Sperry Oil & Gas Company, et al., Appellants, vs. Pearl Chisholm, et al., pellees. No. 6017.

On Appeal from the United States District Court of the Eastern District of Oklahoma.

ORDER.

The above cause was argued, submitted and decided at the May term 1922 of this court. The appellants filed a motion for rehearing. The United States, who are not parties to the cause, subsequently filed a motion for leave to file brief as *amicus curiæ* in support of the motion of appellants. The Mid-Continent Oil and Gas Association, not a party to the cause, filed a similar motion. Appellants have filed a motion for leave to re-argue the case orally upon the petition for re-hearing. It is manifest that if one party is allowed to file a brief as *amicus curiæ*, all must be permitted to do so who apply and appellees will be entitled to answer.

This court has reached a decision that it believes to be correct. The case is of such importance that it will eventually reach the Supreme Court in any event if the record shows error in our decision. Therefore, in view of the facts above recited and after due consideration of the several motions mentioned, it is ordered that said several motions be and they are hereby denied.

October 21, 1922.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. .....

SPERRY OIL & GAS COMPANY, *ET AL.*,
Appellants,
vs.
PEARL CHISHOLM, *ET AL.*, *Appellees.*

BRIEF ON PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

STATEMENT OF CASE, SPECIFICATION OF ERRORS, AND BRIEF OF ARGUMENT ON BEHALF OF PETITIONERS.

Statement.

This case is on appeal before this court and appellants are also applying for a writ of *certiorari* under sections 240 and 262 of the judicial code (36 Stat. 1157 and 1162).

This action was originally brought by Webster Chisholm and Pearl Chisholm, his wife, in the state court of Oklahoma in 1919, to cancel as a cloud upon

the title to the land involved, a certain Departmental oil and gas mining lease which had been executed by Webster Chisholm on May 14, 1904, and which had been extended by a supplemental agreement between the said Webster Chisholm and the original lessee, assignor of appellants, and to enjoin appellants from further operating the lands for oil and gas and to recover the value of oil taken from the land. The case was duly removed to the United States District Court and proceeded to decree therein (273 Federal 589), and upon appeal to the Circuit Court of Appeals a decree affirming the District Court, and cancelling the supplemental agreement was entered (282 Federal 93). The facts are as follows:

Webster Chisholm was a duly enrolled citizen of the Cherokee Nation of one-half Indian blood, Roll No. 30,871. The eighty acres of land involved, the south half of the southeast quarter of section 13, township 21 north, range 12 east, comprised his homestead and surplus allotment of lands in the Cherokee Nation. The "homestead" portion of the allotment under the provisions of the Cherokee Agreement is described as follows:

> southeast quarter of the southwest quarter of the southeast quarter, and west half of the southwest quarter of the southeast quarter of section 13, township 21 north, range 12 east.

The portion designated as "surplus" was the remainder of the eighty acres described as follows:

> southeast quarter of the southeast quarter and

northeast quarter of southwest quarter of the southeast quarter of section 13, township 21, north, range 12 east.

By the Cherokee Agreement (Act of Congress approved July 21, 1902, 32 Stat. L. 716) the allotment of Webster Chisholm was restricted as to alienation, and by section 72 of said agrement it was provided:

> "Cherokee citizens may rent their allotments when restricted * * * ; but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes and for mineral purposes may be also made with the approval of the Secretary of the Interior, and not otherwise."

Section 65 of the same act provides:

> "All things necessary to carry into effect the provisions of this act not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior."

The original lease executed on May 14, 1904, by Webster Chisholm, who was at that time unmarried, was executed while the Act of July 21, 1902, was in force. The lease was to run for a term of fifteen years and was executed under the rules prescribed by the Secretary of the Interior and covered the entire allotment. The lands being described in the lease as:

> "South half of southeast quarter of section thirteen (13) township twenty-one (21) north, range twelve (12) east of the Indian meridian, and containing eighty (80) acres, more or less."

The lease was executed upon the form prescribed by the Secretary of the Interior and among its provisions was the following:

> "And the party of the second part agrees that this indenture of lease shall in all respects be subject to the rules and regulations heretofore, or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation."

By Section 1 of the Act of Congress approved May 27, 1908 (35 Stat. L. 312), the restrictions on the fifty acres of land embraced in the foregoing lease designated as "surplus" were removed, but remained upon the thirty acres described as "homestead," and section 2 of the act provides:

> "That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior, and not otherwise."

Upon the passage of this act the Secretary of the Interior promulgated the following regulation:

> "In event restrictions are removed from a part of the land involved in a lease for oil, gas or other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior, and all royalties thereunder shall be paid to the Indian Agent until such time as the lessor and lessee shall furnish the Secretary of the Interior satisfactory information that adequate arrangements

have been made to account for the oil, gas or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulations provided."

No steps were ever taken to remove any part of the lease from the supervision of the Secretary of the Interior, but by the terms of the quoted regulation the "entire lease" continued "subject to the approval and supervision of the Secretary of the Interior," and all royalties have in fact at all times continued to be paid to the Superintendent of the Five Civilized Tribes. A further regulation of the Secretary of the Interior, effective May 1, 1911, provided:

> "Appropriate changes will be made in the lease form to provide for and carry into effect the provisions of the above modified regulations and such modifications of the regulations and lease form shall be effective May first, nineteen hundred and eleven, and may, at the option of the parties, be incorporated in leases hereafter executed prior to that date. *Said modified provisions may also be substituted in any lease, executed prior to said date on forms now or heretofore in use, in lieu of corresponding provisions contained in such leases, upon formal stipulations by the parties to that effect, when duly approved by the Secretary of the Interior.* All leases which embrace the said provisions, whether in original form or by substitution, shall be subject to these regulations."

Webster Chisholm married the co-plaintiff Pearl Chisholm, on October 11, 1911. She never had any title to the land involved nor any interest in her own right in the oil and gas in and under the same. In April, 1912, Webster and Pearl Chisholm moved upon Webster's allotment and erected a house and barn thereon in the northwest corner of the portion designated as the "homestead," and they have lived there continuously ever since. The "surplus" has no improvements on it other than fences and was used in connection with the other land chiefly for pasture. Several producing wells had been drilled upon the premises when the Chisholms moved thereon, and other wells were drilled while they resided on the land. Altogether eleven wells were drilled, some on the "homestead" and some on the "surplus." This was all done with the knowledge and acquiescence of the Chisholms. All of the royalties were paid to the Indian Superintendent and by him paid to Webster Chisholm who used them, in part at least, for the support of his family.

On March 9, 1914, Webster Chisholm, without his wife joining, executed a stipulation modifying the terms of the original oil and gas mining lease as to the entire eighty acres, so as to make the lease conform to the new lease from prescribed by the Secretary of the Interior under his amended regulations of February 6th and June 29th, 1911. This stipulation was approved by the Secretary. Among other provisions the substituted lease provided that the

same should run for a term of ten years and as long as oil or gas should be found in paying quantities. It also provided for a royalty to be paid at the rate of 12½% instead of 10% as had been fixed in the original lease. Immediately after the execution of this stipulation or supplemental lease all of the remaining locations were drilled up, the last well having been completed October 18th, 1917.

The Circuit Court of Appeals, in affirming the opinion of the trial court, held that under the Oklahoma Enabling Act of June 16, 1906, Section 21, Constitution of Oklahoma, Art. 12, Secs. 1 and 2, and the Revised Laws of Oklahoma, 1910, Secs. 1143, 3342 and 3343, the stipulation extending and modifying the original oil and gas mining lease executed by the husband alone without the wife joining therein, was void although the husband was an Indian allottee and the land embraced his restricted Indian homestead and notwithstanding that the Act of Congress of July 1, 1902, Section 72, and the Act of Congress, May 27, 1908, Sections 1 and 2, provided that the allottee might lease such lands with the approval of the Secretary of the Interior "and not otherwise," and that the stipulation extending and modifying the lease was made pursuant to the rules and regulations of the Secretary of the Interior and duly approved by the Secretary of the Interior. And, also, notwithstanding the provision of Section 1 of the Enabling Act which provides that:

> "Nothing contained in the state constitution shall be construed to limit or impair the

> rights of persons or property pertaining to the Indians of said territory, * * * or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

And the acceptance of said provision by Section 3 of Article 1 of the Constitution of Oklahoma, whereby the inhabitants of Oklahoma "forever disclaim all right and title in or to any * * * lands * * * owned or held by any Indian Tribe or Nation."

A copy of the opinion of the Circuit Court of Appeals and a copy of the court's order denying the petition for rehearing, which was entered on October 21st, 1922, is attached to the petition for *certiorari*, marked Exhibits "A" and "B" respectively.

It is the contention of the petitioners in this court that the importance of the questions involved is sufficient to demand examination of the entire record by *certiorari* and it is also their contention here, as in the lower courts, that the original lease was in all respects valid and within the lawful authority of the Secretary of the Interior; that the supplemental or substituted lease was likewise in all respects valid and that the Act of Congress of May 27, 1908, which had the effect of releasing restrictions upon that portion of Webster Chisholm's allotment designated as "surplus," did not deprive the Secretary of the Interior and the original allottee, Webster Chisholm,

of the right to deal with the lease as an entirety. That the allotment of Webster Chisholm was his separate property and that he had the right to deal with it as he wished without restraint from his wife so long as he conformed to the Acts of Congress and the rules and regulations of the Secretary of the Interior. That the constitutional provision of the State of Oklahoma for a homestead to citizens of the state could not interfere with, hamper or embarass, the instrumentality adopted by the Federal Government for handling the property of its wards, the Indian allottees, in the matter of the development and operation of their Indian lands for oil and gas. That the state homestead right could in no event attach to the thirty-acre Indian homestead tract or deprive the Secretary of the Interior of jurisdiction over it, and as this was a part of the tract on which the plaintiffs were actually resident, the state homestead did not in fact extend to the portion of the fifty acres designated as surplus; and further, should it be held that the state homestead provisions would attach to this separate and distinct property of this Indian allottee, whatever rights the wife acquired by her marriage to Webster Chisholm and by moving upon the lands, were subject to the terms of the original lease, the provisions of the Act of May 27, 1908, and the rules and regulations of the Secretary of the Interior made in pursuance thereof, above quoted, and especially the regulation of May 1st, 1911, which was promulgated five months before Webster Chisholm

married Pearl Chisholm and approximately one year before they moved upon this land. And further, that the plaintiff, Pearl Chisholm, by her silence and acquiescence in what transpired after March 1, 1914, under the amended form of lease, and by suffering and permitting the appellants to expend their money in the development of the property in reliance upon their extended contract, when she either knew or should have known the terms of the amended agreement, and by sharing in the proceeds thereof, was estopped from asserting its invalidity. And lastly, that in any event, since Webster Chisholm was the sole owner of the land, Pearl Chisholm, under no view of the case could have anything but a homestead right of occupancy, which the proof shows she has not been deprived of nor interfered with in regard thereto, and the contract being fully executed as far as Webster Chisholm is concerned, and payments thereon received by him down to the very date of the trial, the unmost decree the court should make would be to protect Pearl Chisholm against any further disturbance of her occupancy than is necessarily involved in the operation of the wells, which were lawfully drilled thereon, all having been actually completed within the fifteen year term of the original lease.

These propositions are fully covered by the specification of errors set out in our petition for writ of *certiorari*.

SPECIFICATION of ERRORS.

First: The Circuit Court of Appeals was in error in affirming the judgment of the trial court, but should have reversed said judgment and order and ordered the bill of complainants dismissed, upon the authority of the decision of this court in *Blansett v. Cardin*, 256 U. S. 319.

Second: The Circuit Court of Appeals erred in its decision making the statutes of Oklahoma requiring the joinder of the wife in contracts relating to the homestead, superior and paramount to the Acts of Congress, permitting restricted Indian allottees to make oil and gas mining leases with the approval of the Secretary of the Interior; and such holding is destructive of the right conferred by the Act approved July 1, 1902, Section 72 (32 Stat. 716), and Act approved May 27, 1908 (35 Stat. 312).

Third: The Circuit Court of Appeals erred in holding that the instrument executed by Webster Chisholm on March 9, 1914, pursuant to the rules and regulations of the Secretary of the Interior and approved by the Secretary, modifying and extending in force the original lease of May 14, 1904, was null and void and that appellants (petitioners here), had no right, title, interest or privilege in the lands by virtue thereof.

Fourth: The Circuit Court of Appeals erred in holding that the plaintiffs were not estopped to question the validity of said stipulation of March 9, 1914.

BRIEF *of* ARGUMENT.

I.

The importance of the questions involved in this controversy is sufficient to demand an examination by this court of the entire record and all proceedings had in the Circuit Court of Appeals by *certiorari*.

The importance of the questions involved in this controversy is at once apparent from the above statement of facts. The Secretary of the Interior has been exercising his prerogative in the approval or disapproval of oil and gas leases covering restricted Indian lands of the Five Civilized Tribes since the passage of the Act known as the Cherokee Agreement (32 Stat. L. 716), and similar acts in so far as they relate to the Five Civilized Tribes. Since the passage of the Cherokee Agreement act and similar acts thousands of leases have been executed by restricted Indians covering millions of acres of land and these leases have received the approval of the Secretary of the Interior. A large number of these leases will fall or stand with the decision of the court in this case. The proposition involved is: Has the Secretary of the Interior the authority to approve and give validity to oil and gas mining leases as provided by the Acts of Congress and his rules and regulations, or must he go further and investigate, *first*, the marital status of a restricted lessor and, *second*, the local laws and constitution of whatever state

such allottee is a resident, and comply also with such local laws and constitutional provisions?

That the Department has always considered allotments to Indians as their separate and distinct property cannot be questioned. The Department was so advised in an opinion by Assistant Attorney General Frank L. Campbell in an opinion dated March 22, 1905 (19 Ops. Asst. Atty. Gen., 277), wherein the allotment of a Nez Perce Indian in Idaho was involved.

The proposition was again announced in a further opinion by Solicitor Charles D. Mahaffie on September 16, 1919, wherein the allotment of an Omaha Indian was involved. In the latter case Solicitor Mahaffie states that,

> "The question presented is whether under the law the wife had the right thus to convey this property independently of her husband, or whether he has such right therein as made it necessary for him to join in the conveyances."

After quoting from the Allotment Acts and laws in Nebraska and the former opinion by Assistant Attorney General Campbell, Solicitor Mahaffie says:

> "None of the acts authorizing the sale of allotted Indian lands provides that the sale shall be controlled by state laws and none of the regulations issued under the various acts provides that the spouse or other heirs of an allottee shall join in the petition for sale, or in case of conveyance, by deed, that they shall join therein. * * * Until the death of an Indian

> allottee the Department recognizes and deals only with him in respect to his property. * * * My opinion is that at the time of her death Jane Merrick Turner had lawfully conveyed the property in question, the character of which was a separate holding under the laws of Nebraska, and consequently her alleged husband, Henry Turner, had and has no interest, legal or equitable, in such property."

While the allotments and Indian tribes involved in the above instances are not of the Five Civilized Tribes, the general policy of the government is the same and an executive department of the government having construed and interpreted an act through a long period of years it has the force and effect of law and thereby becomes a rule of property.

—*Pennoyer* v. *McConnaughy*,
140 U. S. 1, 23, 35 Law. ed. 363, 370;
United States v. *Alabama Great Southern Railroad Co.*,
142 U. S. 615, 35 Law. ed. 1134;
United States v. *Philbrick*,
120 U. S. 52, 30 Law. ed. 559;
Fairbanks v. *United States*,
181 U. S. 283, 309, 45 Law. ed. 862;
United States v. *Heatley*,
160 U. S. 136, 40 Law. ed. 369.

The foregoing statements we feel are sufficient to advise the court of the importance of this controversy and to demand an examination of the entire record and proceedings in the Circuit Court of Appeals by *certiorari*. This the court has the power to

do under the broad provisions of Section 262 of the Judicial Code, and such powers have heretofore been exercised by this court.

Pullman's Palace Car Co. v. *Central Transportation Co.*,
171 U. S. 138, 43 Law. ed. 108;

Union Pacific Railroad Co. v. *Weld County*,
247 U. S. 282, 62 Law. ed. 1110;

Montana Mining Co. v. *St. Louis Mining & Milling Co.*,
204 U. S. 204, 51 Law. ed. 444;

St. Louis Railroad Co. v. *Wabash Railroad Co.*,
217 U. S. 247, 54 Law. ed. 752;

Ex parte Young,
209 U. S. 123, 52 Law. ed. 714.

In the case of *Montana Mining Company* v. *St. Louis Mining and Milling Company of Montana, supra*, the court said:

> "As either by writ of error or *certiorari* the decision of the Court of Appeals can be brought before this court, and as each has been applied for, and as the importance of the case seems to demand our examination, it is scarcely necessary to consume time in attempting to decide positively whether there was a Federal question involved, or the jurisdiction depended solely on diverse citizenship. The writ of error was duly allowed prior to the filing of the record in the first instance, and, to avoid any further question of our jurisdiction, we allow the *certiorari*."

The entire allotment of Webster Chisholm was his separate and distinct property and he had the right to deal with it as he wished without restraint from his wife or without restraint of the Oklahoma Homestead Law, and his right to lease the same was governed solely by the Acts of Congress and rules and regulations of the Secretary, and the supplemental or substituted lease of May 14, 1914, having been executed according to the Acts of Congress and such rules and regulations, was valid in every respect.

For the convenience of the court we will undertake to set out the various constitutional and statutory provisions and all applicable regulations of the Secretary of the Interior which should be considered in this case.

The Cherokee Agreement under which the lands were allotted to Webster Chisholm provided:

> "*Section 72.* Cherokee citizens may rent their allotments when selected * * * but leases for a period longer than one year for grazing purposes, and for a period longer than one year for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise."
>
> "*Section 65.* All things necessary to carry into effect the provisions of this act not otherwise specifically provided shall be done under the authority and direction of the Secretary of the Interior." (32 Stat. L. 716.)

The lease executed by Webster Chisholm under this act, which was upon form prescribed by the Sec-

retary of the Interior, contained the following provision:

> "And the party of the second part agrees that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation."

By the Act of May 27, 1908, the status of the allottee and his allotted lands, with respect to restrictions on alienation, was fixed as follows:

> "*Section 1.* All lands, except homesteads, of said allottees enrolled as mixed blood Indians having half or more than half, and less than three quarters, of Indian blood, shall be free from all restrictions. All homesteads of said allottees enrolled as mixed blood Indians, having half or more than half of Indian blood * * * shall not be subject to alienation, contract to sell, power of attorney, or any other encumbrance prior to April 26, 1931."

And the matter of oil and gas leases as follows:

> "*Section 2.* * * * That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise." (35 Stat. L. 312.)

The applicable regulations of the Secretary of the Interior where modifications of leases made pur-

suant to his rules and regulations were desired, and covering the situation where lands under departmental lease had become in part free from restrictions, but remained restricted as to a part, were as follows:

> "Appropriate changes will be made in the lease form to provide for and carry into effect the provisions of the above modified regulations, and such modifications of the regulations and lease form shall be effective May 1, 1911, and may, at the option of the parties, be incorporated in leases hereafter executed prior to that date. Said modified provisions may also be substituted in any lease, executed prior to said date, on form now or heretofore in use, in lieu of corresponding provisions contained in such leases, upon formal stipulations by the parties to that effect, when duly approved by the Secretary of the Interior. All leases which embrace the said provisions, whether in original form or by substitution, shall be subject to these regulations. These regulations shall not be construed as intended to affect existing approved leases, except where such leases are modified by stipulation, as provided herein, or where such leases are susceptible of modification in these respects by regulation."

And further:

> "In event restrictions are removed from a part of the land included in a lease for oil, gas or other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior, and all royalties thereunder shall be paid to the Indian agent until such time as the lessee and lessor shall furnish the Secretary of the Interior satisfactory

information that adequate arrangements have been made to account for the oil, gas or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulation provided."

The Act of Congress approved March 1, 1907, provided:

"The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, shall be deemed constructive notice." (34 Stat. L. 1015.)

A further regulation of the Secretary of the Interior, effective May 1st, 1911, provides:

"Appropriate changes will be made in the lease form to provide for and carry into effect the provisions of the above modified regulations and such modifications of the regulations and lease form shall be effective May first, nineteen hundred and eleven, and may, at the option of the parties, be incorporated in leases hereafter executed prior to that date. *Said modified provisions may also be substituted in any lease, executed prior to said date on forms now or heretofore in use, in lieu of corresponding provisions contained in such leases, upon formal stipulations by the parties to that effect, when duly approved by the Secretary of the Interior.* All leases which embrace the said provisions, whether in original form or by substitution, shall be subject to these regulations."

Section 1 of the Enabling Act for the admission of Oklahoma as a state of the Union provides:

> "That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided,* that nothing contained in the state constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished), or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed." (34 Stat. L. 267.)

Section 3 of Article 1 of the State Constitution, provides:

> "The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe or nation; and that until the title to any such public lands shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States."

By Section 1 of Article XII, of the said constitution, it is provided:

> "The homestead of any family in this state, not within any city, town or village, shall consist

of not more than one hundred sixty acres of land, which may be in one or more parcels, to be selected by the owner. The homestead within any city, town, or village, owned and occupied as a residence only, shall consist of not exceeding one acre of land, to be selected by the owner: *Provided,* that the same shall not exceed in value the sum of Five Thousand Dollars, and in no event shall the homestead be reduced to less than one-quarter of an acre, without regard to value; *And provided further,* that in case said homestead is used for both residence and business purposes, the homestead interest therein shall not exceed in value the sum of Five Thousand Dollars: *Provided,* that nothing in the laws of the United States, or any treaties with the Indian tribes in the state shall deprive any Indian or other allottee of the benefit of the homestead exemption laws of the state; *And provided further,* that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired."

Section 1143 of the Revised Laws of Oklahoma (1910) is as follows:

"No deed, mortgage or other conveyance relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors; and no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living, and not divorced or legally separated, except to the extent hereinafter provided." (Rev. L. 1910, Sec. 1143.)

Section 1150 of the Revised Laws of Oklahoma (1910) provides:

> "Any person or corporation having knowingly received and accepted the benefits or any part thereof of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefit received by themselves."

It is apparent from a reading of the Acts of Congress and the rules and regulations of the Secretary of the Interior on one hand and the constitutional and statutory provisions of the State of Oklahoma on the other, that there is a sharp conflict in the methods provided for the conveyance of restricted Indian lands. The Acts of Congress and the rules and regulations provide that the allottee may lease his lands with the approval of the Secretary of the Interior and not otherwise. These acts and regulations are similar to those referred to by Solicitor Mahaffie in his opinion to the Department of the Interior, above referred to, in that there is no provision therein that they shall be controlled by state laws or that it is necessary for the spouse to join in such conveyances. The state laws define a homestead and provide that a conveyance relating thereto shall be void unless subscribed by both husband and wife where both are living and not divorced or legally separated.

Congress has always reserved unto itself the authority to legislate concerning tribal property of Indians and the State of Oklahoma has no power over them or their property, other than conferred by the Acts of Congress. This has been repeatedly held to be the law by this court as well as by the Supreme Court of Oklahoma:

Tiger v. *Western Investment Co.*
221 U. S. 286, 55 Law. ed. 738;
Heckman v. *United States,*
224 U. S. 413, 56 Law. ed. 820;
Mullen v. *United States,*
224 U. S. 448, 56 Law. ed. 834;
Goat v. *United States,*
224 U. S. 458, 56 Law. ed. 841;
Deming Investment Co. v. *United States,*
224 U. S. 471, 56 Law. ed. 847;
Truskett v. *Closser,*
236 U. S. 223, 59 Law. ed. 549;
Kenny v. *Miles,*
250 U. S. 58, 63 Law. ed. 841;
Parker v. *Richard,*
250 U. S. 235;
La Mott, et al., v. *United States,*
254 U. S. 570;
Blansett v. *Cardin,*
256 U. S. 319;
Jefferson v. *Winkler,*
26 Okla. 653, 110 Pac. 755;
Kirkpatrick v. *Burgess,*
29 Okla. 121, 116 Pac. 764;
Wilson v. *Morton, et al.,*
29 Okla. 475, 119 Pac. 213;

Chapman v. *Siler*,
30 Okla. 714, 120 Pac. 608;
Walker v. *Brown*,
43 Okla. 144, 141 Pac. 681;
In re Allen's Will,
44 Okla. 392, 144 Pac. 1055;
F. B. Collins Investment Co. v. *Beard*,
46 Okla. 310, 148 Pac. 846;
Ashton v. *Noble*,
46 Okla. 297, 148 Pac. 1042;
Armstrong v. *Letty*,
... Okla. ..., 209 Pac. 168;
White v. *Sallee*,
208 Pac. 214;
Crosby v. *Partridge*,
205 Pac. 758;
Molone v. *Wamsley*,
80 Okla. 181, 195 Pac. 484.

The cases deciding this question could be continued at great length but we believe the above are sufficient to show that this proposition has been settled by an absolutely unbroken line of authorities until the decision by the Circuit Court of Appeals in the present case.

II.

The question to be decided is stated by the Circuit Court of Appeals in their opinion and their comment thereon as follows:

> "The question now presented is whether Section 72 of the Cherokee Agreement or Section 1 of the Act of Congress approved May 27, 1908, *supra*, are repugnant to and inconsistent with the provisions of the laws of Oklahoma which declare that no deed, mortgage, or contract relating to the homestead exempt by law shall be valid, unless in writing and subscribed by both husband and wife. Does the provision of the state law in regard to the conveyance or leasing of the homestead prevent or hinder in any way the Secretary of the Interior from exercising his full power and authority under the laws of Congress referred to? It appears to us that they do not. We cannot see why the provisions of both state and federal law may not be given full force. * * * A valid contract must have been made by the parties themselves, so that, when it was presented to the Secretary of the Interior for his approval, it might come in the form of a valid contract made between the parties, but subject to the approval of the Secretary before it should become effective."

Both of the lower courts apparently based their decision upon the case of *Jennings* v. *Wood*, 192 Federal 507, 122 C. C. A. 657, but this case is not in point. Petitioners do not contend that the Acts of Congress gave the Secretary of the Interior the power to make contracts for the Indian wards of the Government but agree with the court that the law contemplates

the Indian should originate and make leases and the Secretary of the Interior then has the power to approve or disapprove them. As stated by the court in the case of *Jennings* v. *Wood*, "a disapproval was merely a veto," and this we contend is the prerogative of the Secretary of the Interior instead of a spouse. The lease submitted to the Secretary of the Interior in the case of *Jennings* v. *Wood*, was without doubt void as the Indian lessor was mentally incompetent and therefore could not make a valid contract under any law.

We beg to submit to the court that a valid contract or lease was submitted to the Secretary of the Interior for his approval in the present case. Webster Chisholm was an adult Indian on March 9, 1914, and mentally competent to execute a contract. The Acts of Congress and the rules and regulations of the Department of the Interior prescribed how such a contract should be made, and there is no contention that it was not made in all manner and respects to conform to such laws and rules and regulations, and so it received the approval of the Secretary of the Interior. There is only one possible theory upon which the contract can be considered void and that is by reason of the Statute of Oklahoma relating to conveyances of homesteads. We therefore have a contract valid under the Acts of Congress but pronounced invalid under the state laws, and such a construction of the law as placed upon it by the Circuit Court of Appeals certainly prevents and hinders

the Secretary of the Interior as well as the allottee from exercising their power and authority under the Acts of Congress. It makes it necessary for the Secretary of the Interior to look further than the Acts of Congress as to how a contract should be executed, and to consider the effect of local laws upon such contract. Such construction further places in the hands of a spouse the power to thwart the will and desire of an allottee and the Secretary of the Interior. Assuming that a restricted Indian owned an allotment adjacent to a valuable property and desired to lease the same for a large sum of money and the consideration was acceptable to the Secretary of the Interior, but a non-citizen spouse for some reason would not join in the execution of the lease, is it a reasonable construction of the Acts of Congress, taken in connection with the history of the policy of the Government toward its Indian wards, that such spouse would possess this veto power instead of the Secretary of the Interior who is specifically given such authority by the Acts of Congress? This construction would follow only by a reading into the Acts of Congress a meaning which was never intended.

If, therefore, we are correct in our premise that a conflict between the state and federal laws exists we are unalterably driven to the position that the federal law must control. But it is contended by appellees that they, being citizens of the State of Oklahoma, are entitled to the benefit of the laws of the state.

This court held in the case of *Tiger* v. *Western Investment Company*, 221 U. S. 286, that,

> "Congress has full power to legislate concerning tribal property of Indians and the conferring of citizenship on individual Indians does not prevent Congress from continuing to deal with tribal lands."

Also this court in the case of *Truskett* v. *Closser*, 236 U. S. 223, held that under Section 6 of the Act of May 27, 1908, which specifically provided that the persons and property of minor allottees of the Five Civilized Tribes shall "be subject to the jurisdiction of the probate courts of the State of Oklahoma", did not give the state court of Oklahoma the power to confer majority rights upon an Indian minor even though he was not restricted. The Supreme Court of the State of Oklahoma has held this in a number of cases.

The statutes of Oklahoma also provide that the marriage of a minor terminates the guardianship and this has been held by the Supreme Court of Oklahoma not to apply in the case of a Creek Freedman, *Jefferson* v. *Winkler*, 26 Okla. 653. Also it did not apply as to a one-eighth blood Cherokee, *Kirkpatrick* v. *Burgess*, 29 Okla. 121.

The State of Oklahoma has a statute of probate procedure regulating the sale of real estate of minors and the Supreme Court of Oklahoma has held that they must look to the terms of the federal law where Indian lands are conveyed and not to the general statutes of the state authorizing and regu-

lating the sale of the real estate of minors *(Wilson* v. *Morton,* 29 Okla. 475).

The statutes of Oklahoma provide how a will shall be executed and that not more than two-thirds of a testator's property may be devised from a spouse. It is held by the Supreme Court of Oklahoma in the case of *Walker* v. *Brown,* 43 Okla. 144, that where the will was executed in accordance with the Acts of Congress it was valid even though more than two-thirds of the property was devised to others than the spouse.

The statutes of Oklahoma contain provisions relative to champerty and maintenance and this has been held by the Supreme Court of Oklahoma to be, "inapplicable, inoperative and ineffective as against the sale of and a deed to restricted Indian land made in conformity to the laws of the United States by and through its chosen governmental agencies." *(Ashton* v. *Noble,* 46 Okla. 297.)

In 1915, the Legislature of Oklahoma enacted a law requiring the grantors to sign petitions for the approval of deeds to lands inherited by full-blood Indians, and this was held by the Supreme Court of the State of Oklahoma to be beyond the powers of the State Legislature and it upheld a deed executed in accordance with the Acts of Congress and approved by the proper agency. *(Molone* v. *Wamsley,* 80 Okla. 181.)

Aside from the above noted holdings of this court and the Supreme Court of the State of Okla-

homa it is the contention of petitioners that the recent case of *Blansett* v. *Cardin*, 256 U. S. 319, 65 L. ed. 950, 41 Sup. Ct. 519, is absolutely controlling in the case at bar. In this case an Indian woman by will bequeathed more than two-thirds of her property away from her husband—a thing she could not do under the laws of the State of Oklahoma. This will in all respects complied with the Acts of Congress and was approved by the Commissioner of Indian Affairs and the Secretary of the Interior. The husband was bequeathed the sum of five dollars. This court upheld the will and said:

> "In a word, the Act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma Code. And we agree with the Court of Appeals that the Act of Congress was the prompting of prudence to afford 'protection to dependent and natural heirs against the waste of the estate as the result of an unfortunate marriage and enforce inheritance by state laws.' And there can be no doubt that the act was the suggestion of the Interior Department, *and its construction is an assistant, if not demonstrative criterion, of the meaning and purpose of the act. Swigart* v. *Baker*, 229 U. S. 187; *Jacobs* v. *Pritchard*, 223 U. S. 200; *United States* v. *Cerecedo Hermanos*, 209 U. S. 337. *And the regulations of the Department are administrative of the act and partake of its legal force.*"

We therefore contend that it was the intention of Congress and of the law making bodies of Oklahoma to give to the Indian citizen of the state the benefit of all laws of the state where such right or benefit has not been granted by the Acts of Congress, or where such right or claim of benefit is not in conflict or at variance with the general policy of the Government towards its Indian wards.

We maintain that it is as reasonable to contend that an Indian minor may be emancipated by reason of the Oklahoma law authorizing the removal of disability by decree of the court, or by marriage, as it is to contend that an allottee is disabled from leasing without joining the spouse under the Oklahoma homestead law by reason of marriage. The courts have repeatedly held that the former is not applicable to an Indian citizen. Under what reasonable theory can the latter be distinguished?

There is no contest over the validity of the original lease and we urge with utmost confidence in our position that by reason of the provisions of the original lease subjecting the same to the rules and regulations "heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior," and by reason of the provisions of the Act of May 27, 1908, and the rules and regulations promulgated by the Secretary of the Interior subsequent to that time and prior to any attempted impression of homestead character on these lands, that the supplemental lease which covered the allotment in its entirety

was in every respect valid upon approval thereof by the Secretary of the Interior. No question has been raised as to the validity of these regulations and they have been in effect for many years; certainly under the *Blansett-Cardin* case, *supra,* such regulations and their construction by the Secretary of the Interior are demonstrative criterions and partake of its legal force.

III.

The appellees are estopped to assert the invalidity of the supplemental or substituted lease by reason of their acceptance of the increased royalties and the benefits accruing to them thereunder.

Webster Chisholm executed the supplemental lease. Certainly he cannot be heard to question its validity under the plainest principles of equity and good conscience.

Pearl Chisholm, the wife, certainly stands in no better attitude, for she is conclusively charged with notice thereof.

—Act of Congress, approved March 1, 1907, 34 Stat. L. 1026;

Scioto Oil Company v. *O'Hern*, ... Okla. ..., 169 Pac. 483;

Anicker v. *Gunsburg*, 246 Fed. 110;

Anicker v. *Gunsburg*, 226 Fed. 176;

Anchor Oil Co. v. *Gray*, 256 U. S. 519, 257 Fed. 277.

There is no allegation or intimation of fraud practiced upon the part of petitioners or their predecessors. There is no charge that petitioners did not properly develop and operate said lands. On the other hand there is the admission that appellees received the increased benefits under the substituted lease and were accepting and receiving them down to the day of the trial and surely, if they are permit-

ted to come into a court of equity and invoke one state law which will tear down a solemn obligation valid under the Acts of Congress, the same court in good conscience should hold them to another statutory enactment of Oklahoma, Section 1150, Revised Laws, 1910, which provides:

> "Any person or corporation having knowingly received and accepted the benefits or any part thereof of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud * * *."

Unquestionably they are charged with notice of this substituted lease and failing to sound a note of warning equitable estoppel should now force their silence. We contend that the doctrine of equitable estoppel is most applicable here, as stated by Mr. Pomeroy in his work on Equitable Jurisprudence, Vol. 2, Section 802:

> "Its object is to prevent the unconscientious or inequitable assertion or enforcement of claims of rights which might have existed or been enforcible by other rules of the law, unless prevented by the estoppel; and its practical effect is, from the motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefits of the estoppel."

This doctrine has been applied by the Supreme Court of Oklahoma in a case wherein a homestead

was involved. *Brusha, et al.,* v. *Board of Education of Oklahoma,* 41 Okla. 595, 139 Pac. 298. The rule is fundamental as recognized by this court, *Daniels* v. *Tierney,* 102 U. S. 415.

IV.

As Webster Chisholm was the sole owner of the land, Pearl Chisholm under no view of the case could have anything but a homestead right of occupancy of which she has not been deprived, and having sought the aid of a court of equity such court can and should mold a remedy so as to protect such occupancy right without destroying the rights of petitioners.

It is the contention of petitioners that the husband in this case owned this land as his separate and distinct property. The wife owns neither the land nor the oil. She became the wife and entered upon the land after it was encumbered with the original lease and after the passage of the Act of May 27, 1908, and the promulgation of the rules and regulations of the Secretary of the Interior thereunder. The very utmost that ought to be asked or granted, therefore, is that the enjoyment of the homestead occupancy be not further or seriously interfered with. If, as a matter of law, the stipulation extending the lease is technically invalid, because the wife did not join, the husband cannot complain because he has expressly consented thereto, and the wife can only complain to the extent that she shows an

injury to, or real impairment of, the only right she has or can assert, namely the claim of homestead occupancy.

We feel confident that the Circuit Court of Appeals was in error in holding that the renewal lease was void and therefore pray that a writ of *certiorari* be allowed and that the judgment of the Circuit Court of Appeals be reversed.

Respectfully submitted,

ALVIN RICHARDS,
PRESTON C. WEST,
Solicitors for Appellants.

FILED
OCT 29 1954
WM. R. STANSBURY
Clerk

No. 154

In the

Supreme Court of the United States,

October Term, 1954.

SPERRY OIL & GAS COMPANY AND OKLAHOMA PRODUCING & REFINING CORPORATION OF AMERICA, *Appellants*,

vs.

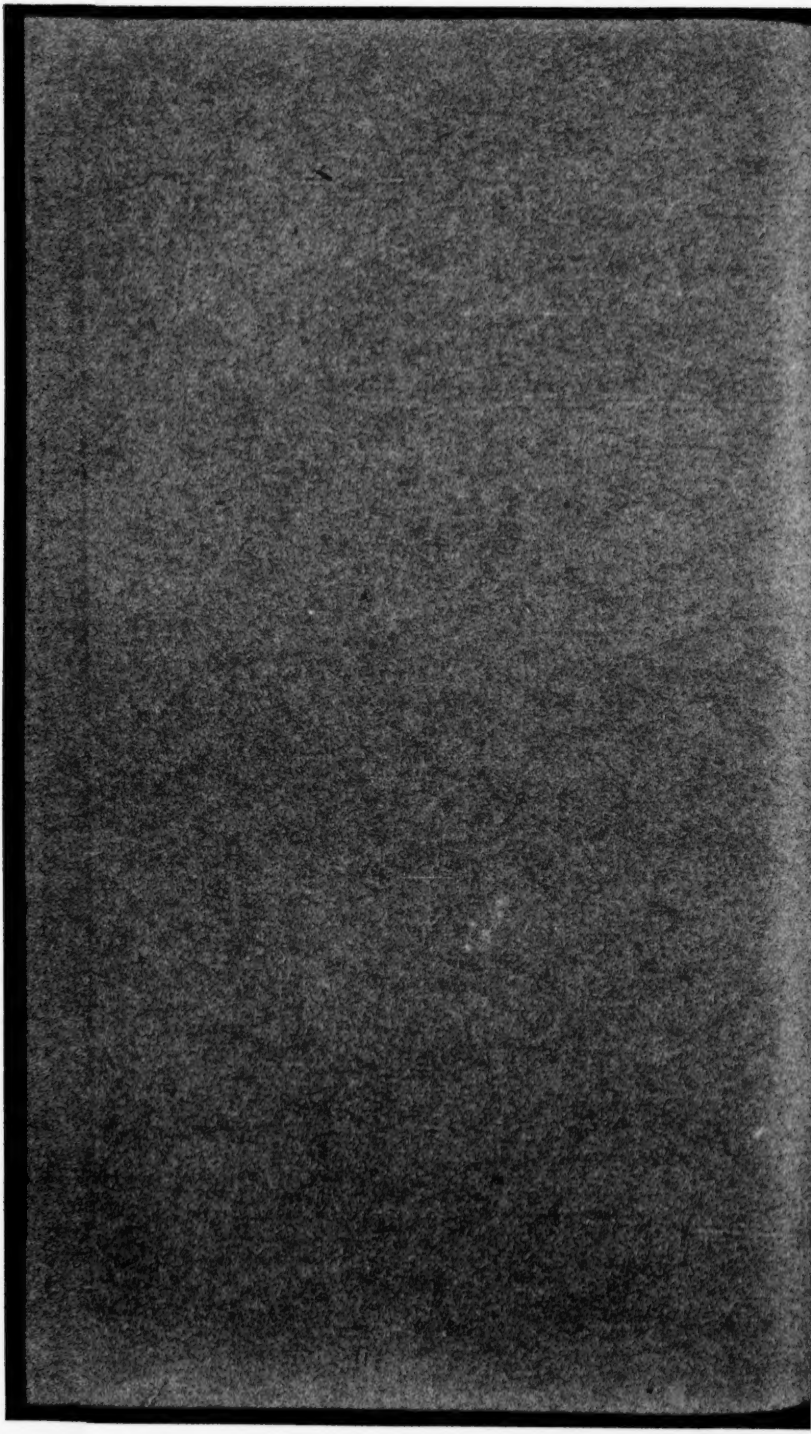
PEARL CHISHOLM AND WEBSTER CHISHOLM, *Appellees*.

SPERRY OIL & GAS COMPANY AND OKLAHOMA PRODUCING & REFINING CORPORATION OF AMERICA, *Petitioners*,

vs.

PEARL CHISHOLM AND WEBSTER CHISHOLM, *Respondents*.

STATEMENT AS TO JURISDICTION OF APPELLANTS AND PETITIONERS.



INDEX.

PAGE

Preliminary Note 1

Statement 2

Specification of Errors 12

Brief of Argument 15

The importance of the questions involved in this controversy is sufficient to demand an examination by this court of the entire record and all proceedings had in the Circuit Court of Appeals by *certiorari* 15

The entire allotment of Webster Chisholm was his separate and distinct property and he had the right to deal with it as he wished without restraint from his wife or without restraint of the Oklahoma Homestead Law, and his right to lease the same was governed solely by the Acts of Congress and rules and regulations of the Secretary, and the supplemental or substituted lease of May 14, 1914, having been executed according to the Acts of Congress and such rules and regulations, was valid in every respect.. 19

The question to be decided, as stated by the Circuit Court of Appeals in their opinion and their comment thereon 31

The appellees are estopped to assert the invalidity of the supplemental or substituted lease by reason of their acceptance of the increased royalties and the benefits accruing to them thereunder 39

As Webster Chisholm was the sole owner of the land, Pearl Chisholm under no view of the

PAGE

case could have anything but a homestead right of occupancy of which she has not been deprived, and having sought the aid of a court of equity such court can and should mold a remedy so as to protect such occupancy right without destroying the rights of petitioners..... 41

Authorities Cited.

Act July 1, 1902, 32 Stat. L. 716.....4, 15, 19
Act June 16, 1906, 34 Stat. L. 267.....9, 23
Act March 1, 1907, 34 Stat. 1015.....22, 39
Act May 27, 1908, 35 Stat. L. 312.....5, 20, 21
Constitution of Oklahoma, Arts. 1 and 12.....24
Regulations Secretary of the Interior, May 1, 1911.....6, 21, 22
Revised Laws Oklahoma, 1910, Secs. 1143, 1150, 3342, 3343.....25, 40

Anicker v. *Gunsburg*, 246 Fed. 110.....39
Anicker v. *Gunsburg*, 226 Fed. 176.....39
Anchor Oil Co. v. *Gray*, 256 U. S. 519, 257 Fed. 277.....39
Ashton v. *Noble*, 46 Okl. 297, 148 Pac. 1042...27, 36
Armstrong v. *Letty*, (Okl.) 209 Pac. 168.....27

Bank v. *Stansbury*, 110 La. 301, 34 So. 452.....29
Belt v. *Bush*, (Okl.) 116 Pac. 935.....30
Blansett v. *Cardin*, 256 U. S. 319.....27, 36, 37
Brusha, et al., v. *Bd. of Ed.*, 41 Okl. 595, 139 Pac. 298.....41

Chapman v. *Siler*, 30 Okl. 714, 120 Pac. 608.....27
Crosby v. *Partridge*, 205 Pac. 758.....27

Daniels v. *Tierney*, 102 U. S. 415.....41
Deming Investment Co. v. *U. S.*, 224 U. S. 471, 56 Law. ed. 847.. 27

Ex parte Young, 209 U. S. 123, 52 Law. ed. 714...18

PAGE

Fairbanks. v. *United States,* 181 U. S. 283, 309, 45 Law. ed. 862.....18

F. B. Collins Investment Co. v. *Beard,* 46 Okl. 310, 148 Pac. 846.....27

Goat v. *U. S.,* 224 U. S. 458, 56 Law. ed. 841.....27

Hay v. *Whitney,* 51 Pac. 896, 59 Kan. 771.....29

Heckman v. *U. S.,* 224 U. S. 413, 56 Law. ed. 820..26

Howard v. *Raymers,* 64 Nebr. 213, 89 N. W. 1004..29

In re Allen's Will, 44 Okl. 392, 144 Pac. 1055....27

Jefferson v. *Winkler,* 26 Okl. 653, 110 Pac. 755..27, 35

Jennings v. *Wood,* 192 Fed. 507, 122 C. C. A. 657..32

Kenny v. *Miles,* 250 U. S. 58, 63 Law. ed. 841....27

Kirkpatrick v. *Burgess,* 29 Okl. 121, 116 Pac. 764.....27, 35

La Mott, et al., v. *United States,* 254 U. S. 570....27

Molone v. *Wamsley,* 80 Okl. 181, 195 Pac. 484....27

Montana M. & M. Co. v. *St. Louis M. & M. Co.,* 204 U. S. 204, 51 Law. ed. 444.....18

Mullen v. *U. S.,* 224 U. S. 448, 56 Law. ed. 839....26

19 Ops. Asst. Atty. Gen., 277.....16

Parker v. *Richards,* 250 U. S. 235.....27

Pennoyer v. *McConnaughy,* 140 U. S. 1, 23, 35 Law. ed. 363, 370.....17

Pomeroy, Eq. Juris., Vol. 2, Sec. 802.....40

Pullman's Palace Car Co. v. *Central Transportation Co.,* 171 U. S. 138, 43 Law. ed. 108.....18

Scioto Oil Co. v. *O'Hern,* .. Okl. .., 169 Pac. 483..39

St. Louis Ry. Co. v. *Wabash Ry. Co.,* 217 U. S. 247, 54 Law. ed. 752.....18

Tiger v. *Western Investment Co.,* 221 U. S. 286, 55 Law. ed. 738.....26, 34

Truskett v. *Closser,* 236 U. S. 223, 59 Law. ed. 549.....27, 34

PAGE

Union Pacific Railroad Co. v. *Weld County*, 247 U. S. 282, 62 Law. ed. 1110.....18

United States v. *Alabama Great Southern Ry. Co.*, 142 U. S. 615, 35 Law. ed. 1134.....17

United States v. *Philbrick*, 120 U. S. 52, 30 Law. ed. 559.....17

United States v. *Heatley*, 160 U. S. 136, 40 Law. ed. 369.....18

Walker v. *Brown*, 43 Okl. 144, 141 Pac. 681...27, 35

White v. *Sallee*, 208 Pac. 214.....27

Wilson v. *Morton, et al.*, 29 Okl. 475, 119 Pac. 213.....27, 35

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 164.

SPERRY OIL & GAS COMPANY AND OKLAHOMA PRODUCING & REFINING CORPORATION OF AMERICA, *Appellants,*

vs.

PEARL CHISHOLM AND WEBSTER CHISHOLM, *Appellees.*

SPERRY OIL & GAS COMPANY AND OKLAHOMA PRODUCING & REFINING CORPORATION OF AMERICA, *Petitioners,*

vs.

PEARL CHISHOLM AND WEBSTER CHISHOLM, *Respondents.*

STATEMENT OF CASE, SPECIFICATION OF ERRORS AND BRIEF OF ARGUMENT ON BEHALF OF APPELLANTS AND PETITIONERS.

Preliminary Note.

In this case appellants and petitioners, in order to save any question as to the method of review-

ing the opinion and judgment of the lower courts, filed its petition for *certiorari*, and also prosecuted an appeal.

The writ of *certiorari* was allowed March 5, 1923, and it was our purpose to submit the whole case on the brief already filed in support of the petition. We are now advised by the clerk that additional copies of the brief will be required in order to do this. We have accordingly reprinted that brief in its entirety and have incorporated therein the formal assignments of error embraced in our appeal. We have also called attention to some additional authorities. The petition for *certiorari* with the exhibits thereto, we have placed at the end, under the title of "Appendix."

Neither the court, nor opposing counsel, need therefore refer to the brief heretofore filed as this present brief contains everything that appeared in the former one, together with some little additional matter.

Statement.

This action was originally brought by Webster Chisholm and Pearl Chisholm, his wife, in the state court of Oklahoma in 1919, to cancel as a cloud upon the title to the land involved, a certain Departmental oil and gas mining lease which had been executed by Webster Chisholm on May 14, 1904, and which had been extended by a supplemental agree-

ment between the said Webster Chisholm and the original lessee, assignor of appellants, and to enjoin appellants from further operating the lands for oil and gas and to recover the value of oil taken from the land. The case was duly removed to the United States District Court and proceeded to decree therein (273 Federal 589), and upon appeal to the Circuit Court of Appeals a decree affirming the District Court, and cancelling the supplemental agreement was entered (282 Federal 93). The facts are as follows:

Webster Chisholm was a duly enrolled citizen of the Cherokee Nation of one-half Indian blood, Roll No. 30,871. The eighty acres of land involved, the south half of the southeast quarter of section 13, township 21 north, range 12 east, comprised his homestead and surplus allotment of lands in the Cherokee Nation. The "homestead" portion of the allotment under the provisions of the Cherokee Agreement is described as follows:

> Southeast quarter of the southwest quarter of the southeast quarter, and west half of the southwest quarter of the southeast quarter of section 13, township 21 north, range 12 east.

The portion designated as "surplus" was the remainder of the eighty acres described as follows:

> Southeast quarter of the southeast quarter and northeast quarter of southwest quarter of the southeast quarter of section 13, township 21 north, range 12 east.

By the Cherokee Agreement (Act of Congress approved July 21, 1902, 32 Stat. L. 716) the allotment of Webster Chisholm was restricted as to alienation, and by section 72, of said agreement it was provided:

> "Cherokee citizens may rent their allotments when restricted * * *; but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes and for mineral purposes may be made also with the approval of the Secretary of the Interior, and not otherwise."

Section 65 of the same act provides:

> "All things necessary to carry into effect the provisions of this act not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior."

The original lease executed on May 14, 1904, by Webster Chisholm, who was at that time unmarried, was executed while the Act of July 21, 1902, was in force. The lease was to run for a term of fifteen years, and was executed under the rules prescribed by the Secretary of the Interior and covered the entire allotment. The lands being described in the lease as:

> South half of southeast quarter of section thirteen (13), township twenty-one (21) north, range twelve (12) east of the Indian Meridian, and containing eighty (80) acres, more or loss."

The lease was executed upon the form prescribed by the Secretary of the Interior, and among its provisions was the following:

> "And the party of the second part agrees that this indenture of lease shall in all respects be subject to the rules and regulations heretofore, or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation." (Rec., pp. 39-45)

By section 1, of the Act of Congress approved May 27, 1908 (35 Stat. L. 312), the restrictions on the fifty acres of land embraced in the foregoing lease designated as "surplus" were removed, but remained upon the thirty acres described as "homestead" and section 2, of the act provides:

> "That leases of restricted lands for oil, gas, or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior, and not otherwise."

Upon the passage of this act the Secretary of the Interior promulgated the following regulation:

> "In event restrictions are removed from a part of the land included in a lease for oil, gas or other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior, and all royalties thereunder shall be paid to the Indian Agent until such time as the lessor and lessee shall

> furnish the Secretary of the Interior satisfactory information that adequate arangements have been made to account for the oil, gas or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulations provided" (Rec., p. 52).

No steps were ever taken to remove any part of the lease from the supervision of the Secretary of the Interior, but by the terms of the quoted regulation the "*entire lease*" continued "*subject to the approval and supervision of the Secretary of the Interior,*" and all royalties have in fact at all times continued to be paid to the Superintendent of the Five Civilized Tribes.

A further regulation of the Secretary of the Interior, effective May 1, 1911, provided:

> "Appropriate changes will be made in the lease form to provide for and carry into effect the provisions of the above modified regulations and such modifications of the regulations and lease form shall be effective May first, nineteen hundred and eleven, and may, at the option of the parties, be incorporated in leases hereafter executed, prior to that date. *Said modified provisions may also be substituted in any lease, executed prior to said date on forms now or heretofore in use, in lieu of corresponding provisions contained in such leases, upon formal stipulations by the parties to that effect, when duly ap-*

proved by the Secretary of the Interior. All leases which embrace the said provisions, whether in original form or by substitution, shall be subject to these regulations" (Rec., pp. 52-53).

Webster Chisholm married the co-plaintiff Pearl Chisholm, on October 11, 1911. She never had any title to the land involved nor any interest in her own right in the oil and gas in and under the same. In April, 1912, Webster and Pearl Chisholm moved upon Webster's allotment and erected a house and barn thereon in the northwest corner of the portion designated as the "homestead" and they have lived there continuously ever since. The "surplus" has no improvements on it other than fences and was used in connection with the other land chiefly for pasture. Several producing wells had been drilled upon the premises when the Chisholms moved thereon, and other wells were drilled while they resided on the land (See Plat; Rec., p. 54½). Altogether eleven wells were drilled, some on the "homestead" and some on the "surplus." This was all done with the knowledge and acquiescence of the Chisholms. All of the royalties were paid to the Indian Superintendent and by him paid to Webster Chisholm, who used them, in part at least, for the support of his family.

On March 9, 1914, Webster Chisholm, without his wife joining, executed a stipulation modifying the terms of the original oil and gas mining lease as to the entire eighty acres, so as to make the lease con-

form to the new lease form prescribed by the Secretary of the Interior under his amended regulations of February 6th and June 29th, 1911. This stipulation was approved by the Secretary. Among other provisions the substituted lease provided that the same should run for a term of ten years and as long as oil or gas should be found in paying quantities. It also provided for a royalty to be paid at the rate of 12½% instead of 10% as had been fixed in the original lease. Immediately after the execution of this stipulation or supplemental lease all of the remaining locations were drilled up, the last well having been completed October 18th, 1917 (Rec., pp. 45-51).

The Circuit Court of Appeals, in affirming the opinion of the trial court, held that under the Oklahoma Enabling Act of June 16, 1906, section 21; Constitution of Oklahoma, Art. 12, Secs. 1 and 2; and the Revised Laws of Oklahoma, 1910, Secs. 1143, 3342 and 3343; the stipulation extending and modifying the original oil and gas mining lease executed by the husband alone without the wife joining therein, was void although the husband was an Indian allottee and the land embraced his restricted Indian homestead, and notwithstanding that the Act of Congress of July 1, 1902, section 72, and the Act of Congress, May 27, 1908, sections 1 and 2, provided that the allottee might lease such lands with the approval of the Secretary of the Interior "and not otherwise," and that the stipulation extending and

modifying the lease was made pursuant to the rules and regulations of the Secretary of the Interior, and duly approved by the Secretary of the Interior. And, also, notwithstanding the provision of section 1, of the Enabling Act, which provides that:

> "Nothing contained in the state constitution shall be construed to limit or impair the right of persons or property pertaining to the Indians of said territory, * * * or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

And the acceptance of said provision by section 3, of Article 1, of the Constitution of Oklahoma, whereby the inhabitants of Oklahoma "forever disclaim all right and title in or to any * * * lands * * * owned or held by any Indian Tribe or Nation."

A copy of the opinion of the Circuit Court of Appeals and a copy of the court's order denying the petition for rehearing, which was entered on October 21st, 1922, is atached to the petition for *certiorari*, marked Exhibits "A" and "B" respectively (See Appendix to this brief).

It is the contention of the petitioners in this court that the importance of the questions involved is sufficient to demand examination of the entire record by *certiorari* and it is also their contention here, as in the lower courts, that the original lease was in

all respects valid and within the lawful authority of the Secretary of the Interior; that the supplemental or substituted lease was likewise in all respects valid and that the Act of Congress of May 27, 1908, which had the effect of releasing restrictions upon that portion of Webster Chisholm's allotment designated as "surplus" did not deprive the Secretary of the Interior and the original allottee, Webster Chisholm, of the right to deal with the lease as an entirety. That the allotment of Webster Chisholm was his separate property and that he had the right to deal with it as he wished without restraint from his wife so long as he conformed to the Acts of Congress and the rules and regulations of the Secretary of the Interior. That the constitutional provision of the State of Oklahoma for a homestead to citizens of the state could not interfere with, hamper or embarrass, the instrumentality adopted by the Federal Government for handling the property of its wards, the Indian allottees, in the matter of the development and operation of their Indian lands for oil and gas. That the state homestead right could in no event attach to the 30-acre Indian homestead tract or deprive the Secretary of the Interior of jurisdiction over it, and as this was the part of the leased land on which the plaintiffs were actually resident, the state homestead did not in fact attach to the fifty acres designated as surplus; and further, even should it be held that the state homestead provisions would attach to this separate and distinct property of this Indian al-

lottee, whatever rights the wife acquired by her marriage to Webster Chisholm and by moving upon the lands, were subject to the terms of the original lease, the provisions of the Act of May 27, 1908, and the rules and regulations of the Secretary of the Interior made in pursuance thereof, above quoted; and especially the regulation of May 1st, 1911, which was promulgated five months before Webster Chisholm married Pearl Chisholm and approximately one year before they moved upon this land. And further, that the plaintiff, Pearl Chisholm, by her silence and acquiescence in what transpired after March 9, 1914, under the amended form of lease, and by suffering and permitting the appellants to expend their money in the development of the property in reliance upon their extended contract, when she either knew or should have known the terms of the amended agreement, and by sharing in the proceeds thereof, was estopped from asserting its invalidity. And lastly, that in any event, since Webster Chisholm was the sole owner of the land, Pearl Chisholm, under no view of the case could have anything but a homestead right of occupancy, which the proof shows she has not been deprived of nor interfered with in regard thereto, and the contract being fully executed as far as Webster Chisholm is concerned, and payments thereon received by him down to the very date of the trial, the utmost decree the court should make would be to protect Pearl Chisholm against any further disturbance of her occupancy than is necessarily

involved in the operation of the wells, which were lawfully drilled thereon, all having been actually completed within the fifteen year term of the original lease.

These propositions are fully covered by the specification of errors set out with our petition for appeal and for writ of *certiorari.*

SPECIFICATION *of* ERRORS.

First. The United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the judgment and decree of the District Court of the United States for the Eastern District of Oklahoma.

Second. The United States Circuit Court of Appeals for the Eighth Circuit erred in denying the motion of appellants for rehearing herein.

Third. The United States Circuit Court of Appeals for the Eighth Circuit erred in declining and refusing to hold that the District Court of the United States for the Eastern District of Oklahoma erred in finding, holding and decreeing that plaintiffs were entitled to the immediate, full, complete and exclusive possession of the land involved in this suit, and that appellant Oklahoma Producing and Refining Corporation of America has no right, title or interest therein for any purpose whatever and enjoining said appellants from interfering with plaintiffs in the exclusive possession of said premises.

Fourth. The United States Circuit Court of Appeals for the Eighth Circuit erred in declining and refusing to hold that the District Court of the United States for the Eastern District of Oklahoma erred in finding, holding and decreeing that the instrument executed by Webster Chisholm, dated March 9, 1914, extending in force the original lease dated May 14, 1904, was null and void and that the appellants had no right, title, interest or privilege in and to said lands by virtue thereof.

Fifth. The United States Circuit Court of Appeals for the Eighth Circuit erred in declining and refusing to hold that the District Court of the United States for the Eastern District of Oklahoma erred in not finding, holding and decreeing that the instrument executed by Webster Chisholm, dated March 9, 1914, extending in force the original lease of May 14, 1904, was good, valid and effectual to confer upon the original lessee and its assignees the oil and gas mining rights in the lands covered by said lease and extension agreement, so long as oil or gas should be produced therefrom in paying quantities.

Sixth. The United States Circuit Court of Appeals for the Eighth Circuit erred in declining and refusing to hold that the District Court of the United States for the Eastern District of Oklahoma erred in not finding, holding and decreeing that the instrument executed by Webster Chisholm dated March 4, 1914, extending in force the original lease, dated May

14, 1904, was good, valid and effectual to confer upon the original lessee and its assignees the oil and gas mining rights in so much at least of the lands covered by said original lease, as constituted the thirty acre Indian homestead portion of Webster Chisholm allotment, so long as oil or gas should be produced therefrom in paying quantities.

Seventh. The United States Circuit Court of Appeals for the Eighth Circuit erred in declining and refusing to hold that the District Court of the United States for the Eastern District of Oklahoma erred in holding that the plaintiffs Webster Chisholm and Pearl Chisholm were not estopped by their acts and conduct, and by the receipt of the royalties under the extension agreement and extended lease, to question the validity of the original lease as modified thereby.

Eighth. The United States Circuit Court of Appeals for the Eighth Circuit erred in refusing to hold that plaintiffs Webster Chisholm and Pearl Chisholm were estopped by their acts and conduct and by the receipt of royalties under the extension agreement and extended lease, to question the validity of said extension agreement or the extension of the original lease as modified thereby.

Ninth. The United States Circuit Court of Appeals for the Eighth Circuit erred in declining and refusing to reverse the final judgment and decree of the District Court of the United States for the East-

ern District of Oklahoma, and declining and refusing to remand this cause to said court with directions to enter a decree for appellants (defendants below) dismissing complainants' bill.

BRIEF *and* ARGUMENT.

I.

The importance of the questions involved in this controversy is sufficient to demand an examination by this court of the entire record and all proceedings had in the Circuit Court of Appeals by *certiorari*.

The importance of the questions involved in this controversy is at once apparent from the above statement of facts. The Secretary of the Interior has been exercising his prerogative in the approval or disapproval of oil and gas leases covering restricted Indian lands of the Five Civilized Tribes since the passage of the Act known as the Cherokee Agreement (32 Stat. L. 716) and similar acts in so far as they relate to the Five Civilized Tribes. Since the passage of the Cherokee Agreement Act, and similar acts, thousands of leases have been executed by restricted Indians covering millions of acres of land and these leases have received the approval of the Secretary of the Interior. A large number of these leases will fall or stand with the decision of the court in this case. The proposition involved is: Has the Secretary

of the Interior the authority to approve and give validity to oil and gas mining leases as provided by the Acts of Congress and his rules and regulations, or must he go further and investigate, *first* the marital status of a restricted lessor, and, *second*, the local laws and constitution of whatever state such allottee is a resident, and comply also with such local laws and constitutional provisions?

That the Department has always considered allotments to Indians as their separate and distinct property cannot be questioned. The Department was so advised in an opinion by Assistant Attorney General Frank L. Campbell in an opinion dated March 22, 1905 (19 Ops. Asst. Atty. Gen. 277), wherein the allotment of a Nez Perce Indian in Idaho was involved.

The proposition was again announced in a further opinion by Solicitor Charles D. Mahaffie on September 16, 1919, wherein the allotment of an Omaha Indian was involved. In the latter case Solicitor Mahaffie states that:

> "The question presented is whether under the law the wife had the right thus to convey this property independently of her husband, or whether he has such right therein as made it necessary for him to join in the conveyances."

After quoting from the Allotment Acts and laws in Nebraska and the former opinion by Assistant Attorney General Campbell, Solicitor Mahaffie says:

"None of the acts authorizing the sale of allotted Indian lands provide that the sale shall be controlled by state laws and none of the regulations issued under the various acts provide that the spouse or other heirs of an allottee shall join in the petition for sale, or in case of conveyance by deed, that they shall join therein. * * * Until the death of an Indian allottee the Department recognizes and deals with him only in respect to his property. * * * My opinion is that at the time of her death Jane Merrick Turner had lawfully conveyed the property in question, the character of which was a separate holding under the laws of Nebraska, and consequently her alleged husband, Henry Turner, had and has no interest, legal or equitable, in such property."

While the allotments and Indian tribes involved in the above instances are not of the Five Civilized Tribes, the general policy of the government is the same and an executive department of the government having construed and interpreted an act with the administration of which it is specially charged, through a long period of years, it has the force and effect of law and thereby becomes a rule of property.

—*Pennoyer* v. *McConnaughy*, 140 U. S. 1, 23, 35 Law. ed. 363, 370;

United States v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615, 35 Law. ed. 1134;

United States v. *Philbrick*, 120 U. S. 52, 30 Law. ed. 559;

Fairbanks v. *United States*, 181 U. S. 283, 309, 45 Law. ed. 862;

United States v. *Heatley*, 160 U. S. 136, 40 Law. ed. 369.

The foregoing statements we feel are sufficient to advise the court of the importance of this controversy and to demand an examination of the entire record and proceedings in the Circuit Court of Appeals by *certiorari*. This court has the power to do so under the broad provisions of section 262, of the Judicial Code, and such powers have heretofore been exercised by this court.

—*Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 43 Law. ed. 108;

Union Pacific Railroad Co. v. *Weld County*, 247 U. S. 282, 62 Law. ed. 1110;

Montana Mining Co. v. *St. Louis Mining & Milling Co.*, 204 U. S. 204, 51 Law. ed. 444;

St. Louis Railroad Co. v. *Wabash Railroad Co.*, 217 U. S. 247, 54 Law. ed. 752;

Ex parte Young, 209 U. S. 123, 52 Law. ed. 714.

In the case of *Montana Mining Company* v. *St. Louis Mining and Milling Company of Montana*, *supra*, this court said:

> "As either by writ of error or *certiorari* the decision of the Court of Appeals can be brought before this court, and as each has been applied for, and as the importance of the case

seems to demand our examination, it is scarcely necessary to consume time in attempting to decide positively whether there was a federal question involved, or the jurisdiction depended solely on diverse citizenship. The writ of error was duly allowed prior to the filing of the record in the first instance, and, to avoid any further question of our jurisdiction, we allow the *certiorari.*"

The entire allotment of Webster Chisolm was his separate and distinct property and he had the right to deal with it as he wished without restraint from his wife or without restraint of the Oklahoma Homestead Law, and his right to lease the same was governed solely by the Acts of Congress and rules and regulations of the secretary, and the supplemental or substituted lease of May 14, 1914, having been executed according to the Acts of Congress and such rules and regulations, were valid in every respect.

For the convenience of the court we will undertake to set out the various constitutional and statutory provisions and all applicable regulations of the Secretary of the Interior which should be considered in this case.

The Cherokee Agreement under which the lands were allotted to Webster Chisholm provided:

"*Section 72.* Cherokee citizens may rent their allotments when selected * * * but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes and for mineral purposes, may also be made with the approval of

the Secretary of the Interior, and not otherwise."

"*Section 65.* All things necessary to carry into effect the provisions of this act not otherwise specifically provided shall be done under the authority and direction of the Secretary of the Interior" (32 Stat. L. 716).

The lease executed by Webster Chisholm under this act, which was upon form prescribed by the Secretary of the Interior, contained the following provision:

"And the party of the second part agrees that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation."

By the Act of May 27, 1908, the status of the allottee and his allotted lands, with respect to restrictions on alienation, was fixed as follows:

"*Section 1.* All lands, except homesteads, of said allottees enrolled as mixed blood Indians having half or more than half, and less than three-quarters, of Indian blood, shall be free from all restrictions. All homesteads of said allottees enrolled as mixed blood Indians, having half or more than half of Indian blood * * * shall not be subject to alienation, contract to sell, power of attorney, or any other encumbrance prior to April 26, 1931."

And the matter of oil and gas leases as follows:

"*Section 2.* * * * That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise" (35 Stat. L. 312).

The applicable regulations of the Secretary of the Interior where modifications of leases made pursuant to his rules and regulations were desired, and covering the situation where lands under departmental lease had become in part free from restrictions, but remained restricted as to a part, were as follows:

"Appropriate changes will be made in the lease form to provide for and carry into effect the provisions of the above modified regulations, and such modifications of the regulations and lease form shall be effective May 1, 1911, and may, at the option of the parties, be incorporated in leases hereafter executed prior to that date. Said modified provisions may also be substituted in any lease, executed prior to that date, on form now or heretofore in use, in lieu of corresponding provisions contained in such leases, upon formal stipulations by the parties to that effect, when duly approved by the Secretary of the Interior. All leases which embrace the said provisions, whether in original form or by substitution, shall be subject to these regulations. These regulations shall not be construed as intended to affect existing approved leases, except where such leases are modified by stipu-

lation, as provided herein, or where such leases are susceptible of modification in these respects by regulation."

And further:

"In event restrictions are removed from a part of the land included in a lease for oil, gas or other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior, and all royalties thereunder shall be paid to the Indian agent until such time as the lessee and lessor shall furnish the Secretary of the Interior satisfactory information that adequate arrangements have been made to account for the oil, gas or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulation provided."

The Act of Congress approved March 1, 1907, provided:

"The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, shall be deemed constructive notice" (34 Stat. L. 1015).

A further regulation of the Secretary of the Interior, effective May 1st, 1911, provides:

"Appropriate changes will be made in the lease form to provide for and carry into effect the provisions of the above modified regulations and such modifications of the regulations and

lease form shall be effective May first, nineteen hundred and eleven, and may, at the option of the parties, be incorporated in leases hereafter executed prior to that date. *Said modified provisions may also be substituted in any lease, executed prior to said date on forms now or heretofore in use, in lieu of corresponding provisions contained in such leases, upon formal stipulations by the parties to that effect, when duly approved by the Secretary of the Interior.* All leases which embrace the said provisions, whether in original form or by substitution, shall be subject to these regulations."

Section 1 of the Enabling Act for the admission of Oklahoma as a state in the Union provides:

"That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, that nothing contained in the State Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished), or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed" (34 Stat. L. 267).

Section 3, of Article 1, of the State Constitution, provides:

"The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any of the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe or nation; and that until the title to any such public lands shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States."

By section 1, of Article XII, of the said constitution, it is provided:

"The homestead of any family in this state, not within any city, town or village, shall consist of not more than one hundred sixty acres of land, which may be in one or more parcels, to be selected by the owner. The homestead within any city, town or village, owned and occupied as a residence only, shall consist of not exceeding one acre of land, to be selected by the owner; *Provided*, that the same shall not exceed in value the sum of five thousand dollars, and in no event shall the homestead be reduced to less than one-quarter of an acre, without regard to value; *And provided further*, that in case said homestead is used for both residence and business purposes, the homestead interest therein shall not exceed in value the sum of five thousand dollars; *Provided*, that nothing in the laws of the United States, or any treaties with the Indian tribes in the state shall deprive any Indian or other allottee of the benefit of the homestead exemption laws of the state; *And provided further*, that any temporary renting of the home-

stead shall not change the character of the same when no other homestead has been acquired."

Section 1143, of the Rivised Laws of Oklahoma (1910), is as follows:

> "No deed, mortgage or other conveyance relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors; and no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living, and not divorced or legally separated, except to the extent hereinafter provided" (Rev. L. 1910, Sec. 1143).

Section 1150, of the Revised Laws of Oklahoma (1910), provides:

> "Any person or corporation having knowingly received and accepted the benefits or any part thereof of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or t e n d e r back the amount of such benefit received by themselves."

It is apparent from a reading of the Acts of Congress and the rules and regulations of the Secretary of the Interior on the one hand and the consti-

tutional and statutory provisions of the State of Oklahoma on the other, that there is a sharp conflict in the methods provided for the conveyance of restricted Indian lands. The Acts of Congress and the rules and regulations provide that the allottee may lease his lands with the approval of the Secretary of the Interior and not otherwise. These acts and regulations are similar to those referred to by Solicitor Mahaffie in his opinion to the Department of the Interior, above referred to, in that there is no provision therein that they shall be controlled by state laws or that it is necessary for the spouse to join in such conveyances. The state laws define a homestead and provide that a conveyance relating thereto shall be void unless subscribed by both husband and wife where both are living and not divorced or legally separated.

Congress has always reserved unto itself the authority to legislate concerning tribal property of Indians, and the State of Oklahoma has no power over them or their property, other than conferred by the Acts of Congress. This has been repeatedly held to be the law by this court as well as by the Supreme Court of Oklahoma:

Tiger v. *Western Investment Co.*, 221 U. S. 286, 55 Law. ed. 738;

Heckman v. *United States*, 224 U. S. 413, 56 Law. ed. 820;

Mullen v. *United States*, 224 U. S. 448, 56 Law. ed. 834;

Goat v. *United States*, 224 U. S. 458, 56 Law ed. 841;

Deming Investment Co., v. *United States*, 224 U. S. 471, 56 Law ed. 847;

Truskett v. *Closser*, 236 U. S. 223, 59 Law. ed. 549;

Kenney v. *Miles*, 250 U. S. 58, 63 Law. ed. 841;

Parker v. *Richard*, 250 U. S. 235;

La Mott, et al., v. *United States*, 254 U. S. 570;

Blansett v. *Cardin*, 256 U. S. 319;

Jefferson v. *Winkler*, 26 Okl. 653, 110 Pac. 755;

Kirkpatrick v. *Burgess*, 29 Okl. 121, 116 Pac. 764;

Wilson v. *Morton, et al.*, 29 Okl. 475, 119 Pac. 213;

Chapman v. *Siler*, 30 Okl. 714, 120 Pac. 608;

Walker v. *Brown*, 43 Okl. 144, 141 Pac. 681;

In re Allen's Will, 44 Okl. 392, 144 Pac. 1055;

F. B. Collins Investment Co. v. *Beard*, 46 Okl. 310, 148 Pac. 846;

Ashton v. *Noble*, 46 Okl. 297, 148 Pac. 1042;

Armstrong v. *Letty*, ... Okl. ...., 209 Pac. 168;

White v. *Sallee*, 208 Pac. 214;

Crosby v. *Partridge*, 205 Pac. 758;

Molone v. *Wamsley*, 80 Okl. 181, 195 Pac. 484.

The cases deciding this question could be continued at great length, but we believe the above are sufficient to show that this proposition has been settled by an absolutely unbroken line of authorities until the decision by the Circuit Court of Appeals in the present case.

But putting the question of paramount authority of the federal statutes, and the regulations of the Secretary of the Interior, to one side, there is another reason why the asserted claims of homestead right cannot, under the facts in this case, obstruct, impair or destroy the extended lease under which the appellants in this case are claiming. The parcel of ground upon which the Chisholms were actually resident, could not be subjected to the homestead claim under the state law as against the lease in question, either in its original form, or as modified and extended by the stipulation which Webster Chisholm had entered into with the consent and approval of the Secretary of the Interior. So far as these thirty acres are concerned, the provisions and requirements of the state law are wholly inapplicable. On the adjacent fifty acres, there were no improvements but fencing; only a small part of it was tilled; and the balance was used for pasture ground. A number of well considered cases have held that if the ground upon which the parties actually reside, is for any reason not subject to the homestead claim, it does not attach to a contiguous tract as to

which there is no such impediment. The cases where the question has arisen, have, in general, been in controversies between creditors and the homestead claimant. Certainly the attitude of appellants here is very much stronger than that of creditors. The land owner was actually benefited by the lease. The interference with the full use and enjoyment of the surface of all the eighty acres, by the appellees, is scarcely appreciable. We think, therefore, the doctrine of the cases to which we have referred, is clearly applicable here.

—*Hay* v. *Whitney*, 51 Pac. 896, 59 Kans. 771;
Bank v. *Stansbury*, 110 La. 301, 34 So. 452;
Howard v. *Raymers*, 64 Nebr. 213, 89 N. W. 1004.

In the *Kansas* case, the homestead claimants were living on leased land and owned a contiguous tract which they were also using in connection therewith, but the owner of the parcel on which they were actually living was also claiming a homestead right in that parcel. It was held that the claim of the parties who were living on this leased tract did not extend to their contiguous land used in connection therewith.

In the *Louisiana* case, the land on which the claimants actually resided, was not subject to a homestead claim because held in "indivision."

In the *Nebraska* case, the parties were living with their father-in-law, but cultivating a tract of

land owned by themselves immediately contiguous thereto.

In the instant case, Webster Chisholm and Pearl Chisholm could not have a homestead under the state constitution and statutes in the Indian's homestead tract, the parcel on which they actually resided, so as to interfere with the paramount authority of the Secretary of the Interior and prevent him and the allottee from dealing with it for oil and gas mining purposes without the joinder of the wife. We cannot believe that under these circumstances any homestead right could be asserted by the Chisholms against the validity of the extended lease held by the appellants, but that the Secretary and the allottee could rightfully make the extended lease covering the entire eighty acres.

There is nothing in *Belt* v. *Bush*, ... Okl. ...., 176 Pac. 935, which conflicts with anything here asserted. On the contrary, we think that case amounts to a distinct recognition of the very principle for which we are contending. It is to be noted that the Supreme Court of Oklahoma in that case made it plain that whatever jurisdition had been assumed by the probate court with reference to the homestead rights of the person there involved, necessarily had to be exercised in conformity to, and not in conflict with, the Acts of Congress relating to the Five Civilized Tribes. The decision proceeded upon the peculiar facts there involved. The dwelling was actually

on land to which the homestead could not attach, but this was due to a mistake, the parties believing it was on the other part, and the barn and part of the curtilage were actually on the tract that could be claimed as a homestead. They therefore held, as we think properly, that this latter tract was not prevented from being impressed with the homestead character because of the mistake in locating the dwelling. The inference is plain that had the parties knowingly occupied a different tract of land in which they could not assert a homestead right, the homestead character would not have been impressed upon the contiguous land used by them.

II.

The question to be decided is stated by the Circuit Court of Appeals in their opinion and their comment thereon as follows:

> "The question now presented is whether section 72, of the Cherokee Agreement or section 1, of the Act of Congress approved May 27, 1908, *supra*, are repugnant to and inconsistent with the provisions of the laws of Oklahoma which declare that no deed, mortgage, or contract relating to the homestead exempt by law shall be valid, unless in writing and subscribed by both husband and wife. Does the provision of the state law in regard to the conveyance or leasing of the homestead prevent or hinder in any way the Secretary of the Interior from exercising his full power and authority under the laws of Congress referred to? It appears to us

> that they do not. We cannot see why the provisions of both state and federal law may not be given full force. * * * A valid contract must have been made by the parties themselves, so that, when it was presented to the Secretary of the Interior for his approval, it might come in the form of a valid contract made between the parties, but subject to the approval of the Secretary before it should become effective."

Both of the lower courts apparently based their decision upon the case of *Jennings* v. *Wood*, 192 Federal, 507, 122 C. C. A. 657, but this case is not in point. Petitioners do not contend that the Acts of Congress gave the Secretary of the Interior the power to make contracts for the Indian wards of the Government, but agree with the court that the law contemplates the Indian should originate and make leases and the Secretary of the Interior then has the power to approve or disapprove them. As stated by the court in the case of *Jennings* v. *Wood*, "a disapproval was merely a veto," and this we contend is the prerogative of the Secretary of the Interior, instead of a spouse. The lease submitted to the Secretary of the Interior in the case of *Jennings* v. *Wood*, without doubt was void as the Indian lessor was mentally incompetent and therefore could not make a valid contract under any law.

We beg to submit to the court that a valid contract or lease was submitted to the Secretary of the Interior for his approval in the present case. Webster Chisholm was an adult Indian on March 9, 1914,

and mentally competent to execute a contract. The Acts of Congress and the rules and regulations of the Department of the Interior prescribed how such a contract should be made, and there is no contention that it was not made in all manner and respects to conform to such laws and rules and regulations, and so it received the approval of the Secretary of the Interior. There is only one possible theory upon which the contract can be considered void and that is by reason of the Statute of Oklahoma relating to conveyances of homesteads. We therefore have a contract valid under the Acts of Congress but pronounced invalid under the state laws, and such a construction of the law as placed upon it by the Circuit Court of Appeals certainly prevents and hinders the Secretary of the Interior as well as the allottee from exercising their power and authority under the Acts of Congress. It makes it necessary for the Secretary of the Interior to look further than the Acts of Congress as to how a contract should be executed, and to consider the effect of local laws upon such contract. Such construction further places in the hands of a spouse the power to thwart the will and desire of an allottee and the Secretary of the Interior. Assuming that a restricted Indian owned an allotment adjacent to a valuable oil property and desired to lease the same for a large sum of money, and the consideration was acceptable to the Secretary of the Interior, but a non-citizen spouse for some reason would not join in the execution of the lease, is

it a reasonable construction of the Acts of Congress, taken in connection with the history and policy of the Government toward its Indian wards, that such spouse would possess this veto power instead of the Secretary of the Interior who is specifically given such authority by the Acts of Congress? This construction would follow only by a reading in to the Acts of Congress a meaning which was never intended.

If, therefore, we are correct in our premise that a conflict between the state and federal laws exists we are unalterably driven to the position that the federal law must control. But it is contended by appellees that they, being citizens of the State of Oklahoma, are entitled to the benefit of the laws of the state.

This court held in the case of *Tiger* v. *Western Investment Company*, 221 U. S. 286, that:

> "Congress has full power to legislate concerning tribal property of Indians and the conferring of citizenship on individual Indians does not prevent Congress from continuing to deal with tribal lands."

Also, this court, in the case of *Truskett* v. *Closser*, 236 U. S. 223, held that under section 6 of the Act of May 27, 1908, which specifically provided that the persons and property of minor allottees of the Five Civilized Tribes shall "be subject to the jurisdiction of the probate courts of the State

of Oklahoma," did not give the state courts of Oklahoma the power to confer majority rights upon an Indian minor, even though he was not restricted. The Supreme Court of Oklahoma has held this in a number of cases.

The Statutes of Oklahoma also provide that the marriage of a minor terminates the guardianship and this has been held by the Supreme Court of Oklahoma not to apply in the case of a Creek freedman: *Jefferson* v. *Winkler*, 26 Okl. 653. Also, it did not apply as to one-eighth blood Cherokee: *Kirkpatrick* v. *Burgess*, 29 Okl. 121.

The State of Oklahoma has a statute of probate procedure regulating the sale of real estate of minors and the Supreme Court of Oklahoma has held that they must look to the terms of the federal law where Indian lands are conveyed and not to the general statutes of the state authorizing and regulating the sale of the real estate of minors (*Wilson* v. *Morton*, 29 Okl. 475).

The Statutes of Oklahoma provide how a will shall be executed and that not more than two-thirds of a testator's property may be divested from a spouse. It is held by the Supreme Court of Oklahoma in the case of *Walker* v. *Brown*, 43 Okl. 144, that where the will was executed in accordance with the Acts of Congress it was valid even though more than two-thirds of the property was devised to others than the spouse.

The Statutes of Oklahoma contain provisions relative to champerty and maintenance and this has been held by the Supreme Court of Oklahoma to be "inapplicable, inoperative and ineffective as against the sale of and a deed to restricted Indian land made in conformity to the laws of the United States by and through its chosen governmental agencies" (*Ashton* v. *Noble*, 46 Okl. 297).

In 1915 the legislature of Oklahoma enacted a law requiring the grantors to sign petitions for the approval of deeds to lands inherited by full-blood Indians, and this was held by the Supreme Court of the State of Oklahoma to be beyond the powers of the state legislature, and it upheld a deed executed in accordance with the Acts of Congress and approved by the proper agency.

Aside from the above noted holdings of this court and the Supreme Court of the State of Oklahoma, it is the contention of petitioners that the recent case of *Blansett* v. *Cardin*, 256 U. S. 319, 65 L. ed. 950, 41 Sup. Ct. 519, is absolutely controlling in the case at bar. In this case an Indian woman by will bequeathed more than two-thirds of her property away from her husband—a thing she could not do under the laws of the State of Oklahoma. This will in all respects complied with the Acts of Congress and was approved by the Commissioner of Indian Affairs and the Secretary of the Interior. The husband was bequeathed the sum of five dollars. The court upheld the will and said:

"In a word, the Act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma Code. And we agree with the Court of Appeals that the Act of Congress was the prompting of prudence to afford 'protection to dependent and natural heirs against the waste of the estate as the result of an unfortunate marriage and enforce inheritance by state laws.' And there can be no doubt that the act was the suggestion of the Interior Department, *and its construction is an assistant, if not demonstrative criterion of the meaning and purpose of the act. Swigart* v. *Baker*, 229 U. S. 187; *Jacobs* v. *Pritchard*, 223 U. S. 200; *United States* v. *Cerecedo Hermanos*, 209 U. S. 337. *And the regulations of the Department are administrative of the act and partake of its legal force.*"

We therefore contend that it was the intention of Congress and of the law making bodies of Oklahoma to give to the Indian citizen of the state the benefit of all laws of the state where such right or benefit has not been granted by the Acts of Congress, or where such right or claim of benefit is not in conflict or at variance with the general policy of the Government toward its Indian wards.

We maintain that it is as reasonable to contend that an Indian minor may be emancipated by reason of the Oklahoma law authorizing the removal of disability by decree of the court, or by mar-

riage, as it is to contend that an allottee is disabled from leasing without joining the spouse under the Oklahoma homestead law by reason of marriage. The courts have repeatedly held that the former is not applicable to an Indian citizen. Under what reasonable theory can the latter be distinguished?

There is no contest over the validity of the original lease and we urge with utmost confidence in our position that by reason of the provisions of the original lease subjecting the same to the rules and regulations "heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior," and by reason of the provisions of the Act of May 27, 1908, and the rules and regulations promulgated by the Secretary of the Interior subsequent to that time and prior to any attempted impression of homestead character on these lands, that the supplemental lease which covered the allotment in its entirety was in every respect valid upon approval thereof by the Secretary of the Interior. No question has been raised as to the validity of these regulations and they have been in effect for many years; certainly under the *Blansett-Cardin* case, *supra*, such regulations and their construction by the Secretary of the Interior are demonstrative criterions of the meaning and purpose of the act and partake of its legal force.

III.

The appellees are estopped to assert the invalidity of the supplemental or substituted lease by reason of their acceptance of the increasd royalties and the benefits accruing to them thereunder.

Webster Chisholm executed the supplemental lease. Certainly he cannot be heard to question its validity under the plainest principles of equity and good conscience.

Pearl Chisholm, the wife, certainly stands in no better attitude, for she is conclusively charged with notice thereof.

—Act of Congress, approved March 1, 1907, 34 Stat. L. 1026;

Scioto Oil Company v. *O'Hern*, .. Okl. ..., 169 Pac. 483;

Anicker v. *Gunsburg*, 246 Fed. 110;

Anicker v. *Gunsburg*, 225 Fed. 176;

Anchor Oil Co. v. *Gray*, 256 U. S. 519, 257 Fed. 277.

There is no allegation or intimation of fraud practiced upon the part of petitioners or their predecessors. There is no charge that petitioners did not properly develop and operate said land. On the other hand there is the admission that appellees received the increased benefits under the substituted lease and were accepting and receiving them down to the day of the trial, and surely, if they are permitted to come into a court of equity and invoke one

state law which will tear down a solemn obligation valid under the Acts of Congress, the same court in good conscience should hold them to another statutory enactment of Oklahoma, section 1150, Revised Laws of 1910, which provides:

> "Any person or corporation having knowingly received and accepted the benefits or any part thereof of any conveyance, mortgage, or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud. * * *"

Unquestionably they are charged with notice of this substituted lease and failing to sound a note of warning equitable estoppel should now force their silence. We contend that the doctrine of equitable estoppel is most applicable here, as stated by Mr. Pomeroy in his work on Equitable Jurisprudence, Vol. 2, section 802:

> "Its object is to prevent the unconscientious or inequitable assertion or enforcement of claims of rights which might have existed or been enforcible by other rules of the law, unless prevented by the estoppel. And its practical effect is, from the motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefits of the estoppel."

This doctrine has been applied by the Supreme Court of Oklahoma in a case wherein a homestead

was involved. *Brusha, et al.*, v. *Board of Education of Oklahoma*, 41 Okl. 595, 139 Pac. 298. The rule is fundamental as recognized by this court, *Daniels v. Tierney*, 102 U. S. 415.

IV.

As Webster Chisholm was the sole owner of the land, Pearl Chisholm under no view of the case could have anything but a homestead right of occupancy of which she has not been deprived, and having sought the aid of a court of equity such court can and should mold a remedy so as to protect such occupancy right without destroying the rights of petitioners.

It is the contention of petitioners that the husband in this case owned this land as his separate and distinct property. The wife owns neither the land nor the oil. She became the wife and entered upon the land after it was encumbered with the original lease and after the passage of the Act of May 27, 1908, and the promulgation of the rules and regulations of the Secretary of the Interior thereunder. The very utmost that ought to be asked or granted, therefore, is that the enjoyment of the homestead occupancy be not further or seriously interfered with. If, as a matter of law, the stipulation extending the lease is technically invalid, because the wife did not join, the husband cannot complain because he has expressly consented thereto, and the wife can only complain to the extent that

she shows an injury to, or real impairment of, the only right she has or can assert, namely, the claim of homestead occupancy.

We feel confident that the Circuit Court of Appeals was in error in holding that the lease under which appellants and petitioners are operating, as extended and modified by the stipulation of the allottee, approved by the Secretary of the Interior, was void. It should have held the lease good and reversed the trial court. We therefore ask a reversal of the judgments appealed from.

Respectfully submitted,

ALVIN RICHARDS,
A. A. DAVIDSON,
PRESTON C. WEST,
Solicitors for Appellants and Petitioners.

Appendix.

In the Supreme Court of the United States, October Term, 1922.—Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America, Petitioners, v. *Pearl Chisholm and Webster Chisholm, Respondents.*—No. ....

PETITION FOR *CERTIORARI.*

To the Honorable the Supreme Court of the United States:

Your petitioners, Sperry Oil & Gas Company and Oklahoma Producing and Refining Corporation of America, respectfully state and show to this court:

That this suit was instituted by plaintiffs, Pearl Chisholm and Webster Chisholm, in the District Court of Tulsa County, State of Oklahoma, for the purpose of having an oil and gas mining lease made by Webster Chisholm, a Cherokee Indian of the half-blood, and the allottee of the land involved, pursuant to the laws of the United States and the rules and regulations of the Secretary of the Interior, and a certain extension agreement whereby the original lease was modified and extended, the said extension agreement being also made under the rules of the Secretary, declared null and void and canceling the same, and of obtaining a decree enjoining defendants (who are petitioners here) from assert-

ing any further claim to the land covered by said lease and extension agreement; and to recover for oil and gas that had been extracted from the land.

Defendants (who are the petitioners here) by their answers relied upon the oil and gas lease and the extension agreement, so made by the allottee pursuant to the laws of the United States and the rules and regulations of the Secretary, being the same instruments as to which plaintiffs were seeking cancellation. They also set up the defense of estoppel because plaintiffs had voluntarily and with knowledge accepted and retained all royalties and benefits under the lease and extension thereof.

The cause was in apt time removed to the District Court of the United States upon the ground that the controversy presented a federal question and required a consideration and construction of the laws of the United States with respect to the allotment of the lands of the Cherokee Nation and the rules and regulations of the Secretary of the Interior governing the leasing of such allotted land for oil and gas mining purposes.

And the jurisdiction of the court was based under statutes of the United States and particularly under the statute entitled "An Act to Provide for the Allotment of the Lands of the Cherokee Nation, for the Disposition of Townsites therein, and for Other Purposes" (32 Stat. 716), and the statute entitled "An Act for the Removal of Restrictions from

Part of the Lands of Allottees of the Five Civilized Tribes, and for Other Purposes" (35 Stat. 312).

The facts are as follows:

Webster Chisholm was duly enrolled as a citizen of the Cherokee Nation of one-half Indian blood, Roll No. 30871. The eighty acres of land involved (S2 of SE4, section 13, T. 21 N., R. 12 E.) was duly allotted to him, and thirty acres designated as "homestead" and fifty acres as "surplus," and separate patents issued therefor.

By the Cherokee Agreement (Act approved July 1, 1902, 32 Stat. 716) the entire allotment was restricted as to alienation, and by section 72 of that act it was provided:

> "Cherokee citizens may rent their allotments when selected * * * but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise."

And by section 65:

> "All things necessary to carry into effect the provisions of this act not otherwise specifically provided shall be done under the authority and direction of the Secretary of the Interior."

May 14, 1904, Chisholm (being at that time an unmarried man) made an oil and gas lease cover-

ing his entire allotment. This lease was made with the approval and under the rules and regulations of the Secretary of the Interior. It describes the land as a single tract, thus:

> "The south half of the southeast quarter of section thirteen, township 21 north, range 12 east of the Indian Meridian, and containing eighty (80) acres, more or less."

The lease was for the term of fifteen years and contained the following, among other provisions:

> "And the party of the second part agrees that this indenture of lease shall in all respects be subject to the rules and regulations heretofore, or that may hereafter be, lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation."

By section 1 of the Act of Congress approved May 27, 1908 (35 Stat. 312), restrictions were removed from the fifty acres constituting Chisholm's "surplus" allotment but continued as to the thirty acres designated as "homestead;" and section 2 of that act provided:

> "That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior, and not otherwise."

The Secretary of the Interior thereupon made the following rule:

> "In event restrictions are removed from a part of the land included in a lease for oil, gas or other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior, and all royalties thereunder shall be paid to the Indian Agent until such time as the lessor and lessee shall furnish the Secretary of the Interior satisfactory information that adequate arrangements have been made to account for the oil, gas, or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulations provided."

No steps were ever taken to remove any part of the land from the supervision of the Secretary, and by the terms of this regulation, the "entire lease" continued "subject to approval and supervision of the Secretary of the Interior," and royalties have at all times been paid to the Superintendent.

A further regulation of the Secretary, effective May 1, 1911, provided:

> "Appropriate changes will be made in the lease form to provide and carry into effect the provisions of the above modified regulations and such modifications of the regulations and lease form shall be effective May 1, 1911, and

may, at the option of the parties, be incorporated in leases hereafter executed prior to that date. Said modified provisions may also be substituted in any lease, executed prior to said date on forms now or heretofore in use, in lieu of corresponding provisions contained in such leases, upon formal stipulations by the parties to that effect, when duly approved by the Secretary of the Interior. All leases which embrace the said provision, whether in original form or by substitution, shall be subject to these regulations."

October 11, 1911, Webster Chisholm married Pearl Chisholm. She never had any title to the land involved nor any interest in her own right in the oil or gas under it. April 12, 1912, Webster and Pearl Chisholm took up their actual residence on this allotment. They built a house and barn on the tract designated as "homestead" (which was and still is restricted as to alienation) and have lived there continuously since. The "surplus" has no improvements on it other than fences and was used in connection with the other lands chiefly for pasturage. Several producing wells had already been drilled upon the premises when the Chisholms moved thereon. Other wells were drilled while they resided on the land. Altogether eleven wells were sunk, some on the homestead and some on the surplus. This was all done with the knowledge and acquiescence of the Chisholms. All the royalties were paid through the Indian Superintendent and Webster

Chisholm used them, in part, at least, for the support of his family.

March 9, 1914, Webster Chisholm executed (without his wife joining) a stipulation modifying the term of the original lease as to the whole eighty acres, so as to make the lease conform to the new lease form prescribed by the Secretary of the Interior under his amended regulations of February 6 and June 29, 1911. This stipulation was approved by the Secretary. Thereafter royalties were paid at the rate of twelve and one-half (12½) per cent instead of ten (10) per cent, as had been fixed in the original lease. This stipulation modified also the term of the lease so as to make it "for ten years and as long as oil or gas should be found in paying quantities." Five of the wells on the premises were drilled after Webster Chisholm executed this stipulation.

The trial court gave judgment for the plaintiffs and enjoined defendants (petitioners here) from further operating for oil and gas. The case was taken up by appeal to the Circuit Court of Appeals for the Eighth Circuit, and that court affirmed the decree of the trial court (282 Fed. 93) holding that under Oklahoma Enabling Act of June 16, 1906, section 21, the Constitution of Oklahoma, article 12, sections 1 and 2, and Revised Laws of Oklahoma, 1910, sections 1143, 3342, 3343, the stipulation extending and modifying the original oil and gas lease executed by the husband alone, without the wife

joining therein, was void, although the husband was an Indian allottee and the land embraced his restricted Indian homestead allotment, and notwithstanding that the Act of July 1, 1902, section 72, and the Act of May 27, 1908, sections 1 and 2, provided that the allottee might lease such lands with the approval of the Secretary, and though the stipulation extending and modifying the lease was made pursuant to the rules and regulations of the Secretary of the Interior and duly approved by the Secretary.

A copy of the opinion of the Circuit Court of Appeals is attached to this petition marked Exhibit "A."

The Circuit Court of Appeals also, on October 21, 1922, denied a petition for rehearing, and a true copy of its final order and judgment denying the petition for rehearing is attached hereto marked Exhibit "B."

The decision in the Circuit Court of Appeals turned upon the question of whether, notwithstanding section 72 of the Cherokee Agreement (Act of July 1, 1902, 32 Stat. 716) and section 2 of the Act of May 27, 1908 (35 Stat. 312), providing that leases of restricted lands for oil and gas mining purposes "may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise," a stipulation extending and modifying an

existing oil and gas lease, by an allottee, made under rules and regulations prescribed by the Secretary, and approved by the Secretary, must, to be valid, be joined in by the spouse of the allottee where the lands embraced were occupied as a homestead, because by the state laws (Revised Laws of 1910, section 1143) it is declared that no deed, mortgage, or contract relating to the homestead "shall be valid unless in writing and subscribed by both husband and wife." Or, as stated by that court:

> "The ultimate question presented is whether the laws of Oklahoma relating to the conveyance of the homestead as defined by said laws are repugnant to the laws of Congress regulating the leasing of restricted Indian lands; and whether 'restricted' means in this connection, lands that were non-alienable for the period of twenty-five years from the date of allotment."

In reaching the conclusion that because the lands involved were occupied as a homestead, the allottee could not make a valid stipulation modifying and extending a lease that was executed under the regulations of the Secretary, and approved by him, unless the wife joined therein, the Circuit Court of Appeals undertook to distinguish the case of *Blansett* v. *Cardin*, 256 U. S. 319, in which this court held that under Act of Congress of June 25, 1910 (37 Stat. 678), a married Indian allottee could, with the approval of the Secretary, make a valid will of all her allotted land, though a state statute of Oklahoma provided that no married woman should de-

vise more than two-thirds of her property away from her husband, and another state statute undertook to confer on the surviving husband the right "to possess and occupy the whole homestead."

Your petitioners are advised that the Circuit Court of Appeals was in error in affirming the judgment of the trial court, but should have reversed said judgment and order and ordered the bill of complainants dismissed, upon the authority of the decision of this court in *Blansett* v. *Cardin, supra.*

That the Circuit Court of Appeals erred in its decision in making the Statutes of Oklahoma requiring the joinder of the wife in contracts relating to the homestead, superior and paramount to the Acts of Congress, permitting restricted Indian allottees to make oil and gas mining leases with the approval of the Secretary of the Interior; and such holding is destructive of the right conferred by the Act approved July 1, 1902, section 72 (32 Stat. 716), and Act approved May 27, 1908, section 2 (35 Stat. 312).

That the Circuit Court of Appeals erred in holding that the instrument executed by Webster Chisholm, March 9, 1914, pursuant to the rules and regulations of the Secretary of the Interior, and approved by the Secretary, modifying and extending in force the original lease of May 14, 1904, was null and void and that appellants (petitioners here) had no right, title, interest or privilege in the lands by virtue thereof.

That the Circuit Court of Appeals erred in holding that the plaintiffs were not estopped to question the validity of said stipulation of March 9, 1914.

Your petitioners present herewith, as part of this petition, a transcript of the record of the Circuit Court of Appeals. Also a printed brief in support of this application.

Wherefore, your petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in this case, which was entitled in that court, to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate and that the said judgment of the said Circuit Court of Appeals may be reversed by this honorable court.

Sperry Oil & Gas Company,
Oklahoma Producing and Refining
Corporation of America,
By Alvin Richards,
Preston C. West,
Their Solicitors.

State of Oklahoma, County of Tulsa—ss.

I, Preston C. West, having been first duly sworn, upon oath state: That I am one of the solicitors for the petitioners herein, and as such had personal charge of the cause in the foregoing petition mentioned in the Circuit Court of Appeals; that I prepared the foregoing petition and that the allegations thereof are true as I verily believe.

Preston C. West.

Subscribed and sworn to before me this 11th day of December, A. D. 1922. Anna Golloday Bell, Notary Public. (Seal) My commission expires November 25, 1925.

Respondents hereby acknowledge receipt of copy of the foregoing petition, this 11th day of December, 1922, together with brief in support thereof.

Pearl Chisholm and
Webster Chisholm,
By Howard Langley,
Harve N. Langley,
S. R. Lewis,
By O. S. Booth,
O. S. Booth,
Their Solicitors.

Exhibit A.

In the Circuit Court of Appeals for the Eighth Circuit.—Sperry Oil & Gas Company, et al., Appellants, v. *Pearl Chisholm, et al., Appellees.*—No. 6017.

(OPINION CIRCUIT COURT OF APPEALS.)

1. *Indians* 16 (3). Indian allottee's lease of "homestead," not signed by wife, void, though approved by the Secretary of the Interior. Under Oklahoma Enabling Act, June 16, 1906, Sec. 21, Const. Okla., Art. 12, Secs. 1, 2, and Rev. Laws, Okla., 1910, Secs. 1143, 3342, 3343, a renewal of an oil and gas lease executed by the husband on the homestead without the wife joining therein, was void, though the husband was an Indian allottee and the land was his "homestead allotment," within Act July 1, 1902, Sec. 72, 1908, Secs. 1, 2, providing that allottee may lease such land with the approval of the Secretary of the Interior, and though such renewal was signed by the Secretary of the Interior, since such federal statutes are not repugnant to the laws of Oklahoma, relating to homesteads, and requiring leases to be signed by both husband and wife; the words "homestead" and "surplus" in allotments made to Indians, having been used merely to classify the lands, and the real homestead to which a citizen of the state is entitled being the homestead created by the state laws.

(Ed. Note: For other definitions, see Words and Phrases, First and Second Series, Homestead.)

2. *Evidence* 11. Judicial notice taken that many citizens of Oklahoma who framed constitution were Indians. The Circuit Court of Appeals will take judicial notice that a large portion of the citizens of the Territory of Oklahoma and the Indian Territory who framed the constitution were Indians who owned their own homes.

3. *Homestead* 112. Husband and wife held not estopped to deny validity of oil and gas lease on homestead for failure of wife to join therein. Where wife had no knowledge that oil and gas lease on homestead had been renewed by the husband, before the expiration of the original lease, and receive no part of the royalties, and there was no showing that the lessee would have taken such lease but for the conduct of husband and wife, the husband and wife were not estopped from asserting the invalidity of the deed for failure of the wife to join therein.

Appeal from the District Court of the United States for the Eastern District of Oklahoma: Robert L. Williams, Judge.

Action by Pearl Chisholm and another against the Sperry Oil & Gas Company and another. Judgment for plaintiffs (*Chisholm* v. *Creek and Indiana Development Co.*, 273 Fed. 589), and defendants appeal. Affirmed.

Preston C. West, of Tulsa, Okla. (Alvin Richards, A. A. Davidson, Roger S. Sherman and Grey

Moore, all of Tulsa, Okla., on the brief), for appellants.

J. Howard Langley, of Pryor, Okla. (Harve N. Langley, of Pryor, Okla., and S. R. Lewis and O. S. Booth, both of Tulsa, Okla., on the brief), for appellees.

Before CARLAND and KENYON, Circuit Judges, and JOHNSON, District Judge.

CARLAND, Circuit Judge: This is an appeal from a decree adjudging appellants to have no interest in or right of possession to the real estate hereinafter mentioned and enjoining them from interfering with appellees' full and exclusive possession thereof. The facts as found by the trial court are as follows:

> "That the real estate involved in this cause, *viz.*, the south half of the southeast quarter of section 13, township 21 north, and range 12 east, situs in Tulsa County, Oklahoma, is the allotment of the plaintiff, Webster Chisholm, a half-blood Cherokee Indian, whose Cherokee citizen roll number is 30,871, said lands being regularly conveyed to him by the Cherokee Nation as his said allotment and distributive share of the tribal lands of said nation or tribe of Indians, and that, of the aforesaid 80 acres of land, the following parcel constitutes his tribal homestead allotment, *viz.*, west half of southwest quarter of southeast quarter, and southeast quarter of southwest quarter of southeast quarter of said section, township, range and county, and that the remainder of said 80 acres of land constitutes the tribal surplus allotment of said Webster Chisholm. That upon May 14,

1904, the plaintiff, Webster Chisholm, whilst a single person, executed an oil and gas lease covering all of said 80 acres of land aforedescribed, in favor of defendant, Creek & Indiana Development Company, a corporation, said lease being duly approved by the Secretary of the Interior on May 4, 1905, and that said lessee entered upon said premises and explored and discovered oil in paying quantities; that the said lessee, Creek & Indiana Development Company, a corporation, thereafter, on July 18, 1914, sold and assigned its rights and interest in said lease unto the defendant Sperry Oil & Gas Company, a corporation; and that thereafter, on November 25, 1918, the said assignee, Sperry Oil & Gas Company, a corporation, sold and assigned its rights and interest in said lease unto the defendant, Oklahoma Producing & Refining Corporation of America, a corporation, and that the last named assignee has continued to and is now operating said lease for oil and gas as afterward modified and attempted to be extended, and removing oil and gas from said lands. That the lease executed by the plaintiff, Webster Chisholm, upon May 14, 1904, aforesaid, was made for a definite period of 15 years from its date, and that said lease expired, terminated and ended on May 14, 1919. That upon the 11th day of November, 1911, the plaintiffs, Webster Chisholm and Pearl Chisholm, were legally married, and that the plaintiffs moved upon the lands involved in this cause in the spring of the year 1912, and then and there the state homestead status attached thereto, and they have continuously and uninterruptedly since then and to this time occupied the aforedescribed land as their home and homestead under the state law.

That neither of the plaintiffs have or possess any other real estate than that involved in this suit. That the plaintiffs have from their occupancy of said lands in the spring of 1912 claimed the aforesaid land as their homestead, and that said lands have constituted their homestead under the constitution and statute laws of Oklahoma from their occupancy thereof in the spring of 1912, and have so continued to be occupied by them as their homestead, and now constitutes the same and was such homestead at the time the supplemental contract was executed by Webster Chisholm.

"The court further finds that upon March 9, 1914, the plaintiff, Webster Chisholm, signed, executed and delivered unto defendant, Creek & Indiana Development Company, a corporation, an instrument in writing under its terms extending in force, as long as oil or gas is found in paying quantities, the lease aforementioned, and that said instrument, under such terms extending in force as long as oil or gas is found in paying quantities the lease aforementioned (the lease so extended being dated May 14, 1904), increased the royalty from one-tenth of the total production to one-eighth of the total production; that said instrument providing for the extending in force and continuing the terms of the original lease dated May 14, 1904, was not executed by or joined in by the plaintiff, Pearl Chisholm, his wife, but executed only by the said Webster Chisholm; that the said Pearl Chisholm, the then wife of the said Webster Chisholm, did not join the execution of said instrument, nor did she give her consent thereto, nor did she have any knowledge thereof, and that the said Pearl Chisholm had no knowledge

of the existence of said instrument extending in force and continuing the terms of said lease until after May 14, 1919, and just prior to the beginning of this action; and the court further finds that the instrument dated March 9, 1914, extending in force and continuing the terms of the original lease aforesaid, is null and void, for the reason that the wife of the said Webster Chisholm, *viz.*, the said Pearl Chisholm, did not join in the execution of the same."

There was no provision in the original lease stipulating for an extension or renewal thereof. The ruling of the trial court, holding the renewal lease void because Pearl Chisholm did not join therein, is assigned as error. The ultimate question presented is whether the laws of Oklahoma relating to the conveyance of the homestead as defined by said laws are repugnant to the laws of Congress regulating the leasing of restricted Indian lands; the word "restricted," meaning, in this connection, lands that were non-alienable for the period of 25 years from date of allotment. The laws of Congress providing for the leasing of restricted Indian allotments at the time of the lease of May 14, 1904, and the renewal thereof March 9, 1914, were as follows:

By the Cherokee Agreement (Act of Congress approved July 1, 1902, 32 Stat. 716), the allotment of Webster Chisholm was restricted as to alienation, and by section 72 of the said agreement it was provided:

"Cherokee citizens may rent their allotments when selected for a term not to exceed * * *; but leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes and for mineral purposes may be made also with the approval of the Secretary of the Interior, and not otherwise."

By section 1 of the Act of Congress approved May 27, 1908 (35 Stat. 312), the restrictions on the 50 acres embraced in the lease designated as surplus allotment were removed but the restrictions remained upon the 30 acres designated as a homestead allotment. Section 2 of the same act provided:

"The leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior * * * and not otherwise."

The regulation of the Secretary of the Interior, where restrictions were removed from a part of the land included in a lease for oil, gas and other mineral purposes, was as follows:

"In event restrictions are removed from a part of the land included in a lease for oil, gas and other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior and all royalties thereunder shall be paid to the Indian Agent until such time as the lessor and lessee

shall furnish the Secretary of the Interior satisfactory information that adequate arrangements have been made to account for the oil, gas, or other mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulations provided."

It does not appear that the lessor and lessee in the case now under consideration ever furnished the Secretary of the Interior satisfactory information that adequate arrangements had been made to account for the oil, gas or mineral upon the restricted land separately from that upon the unrestricted. The laws relating to the creation of a homestead and the conveyance thereof in the State of Oklahoma are as follows:

The Oklahoma Enabling Act, approved June 16, 1906, by section 21, provided as follows:

"* * * And all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state except as modified or changed by this act or by the constitution of the state. * * *" (34 Stat. 277.)

The Constitution of the State of Oklahoma (article 12, section 1) defines the homestead as follows:

"The homestead of any family in this state, not within any city, town or village, shall con-

> sist of not more than one hundred and sixty acres of land which may be in one or more parcels, to be selected by the owner. * * * That nothing in the laws of the United States, or any treaties with the Indian tribes in the state, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the state."

The above section of the constitution was also enacted into the Revised Statutes of Oklahoma of 1910, appearing as section 3343. Section 2 of article 12, Constitution of Oklahoma, provides as follows:

> "The homestead of the family shall be, and is hereby, protected from forced sale for the payment of debts, except for the purchase money; * * * nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law."

Section 3342 of the Revised Laws of Oklahoma provides as follows:

> "The following property shall be reserved to the head of every family residing in the state exempt from attachment or execution and every other species of forced sale for the payemnt of debts except as hereinafter provided:
>
> "*First.* The homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife."

At the time of the admission of the State of Oklahoma into the Union, there was in force section

880, Wilson's Revised Laws of Oklahoma of 1903, which contained the following language:

> "* * * And no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced, except to the extent hereinafter provided."

1. Section 1143, Revised Laws of Oklahoma of 1910, contains this same provision, with the addition of the words "or legally separated," which laws were in force and effect at the time of the execution of the renewal lease of March 9, 1914; it clearly appears from the laws thus quoted that, so far as the laws of Oklahoma are concerned, the renewal lease was void. The question now presented is whether section 72 of the Cherokee Agreement or section 1 of the Act of Congress approved May 27, 1908, *supra*, are repugnant to and inconsistent with the provisions of the laws of Oklahoma which declare that no deed, mortgage or contract relating to the homestead exempt by law shall be valid, unless in writing and subscribed by both husband and wife. Does the provision of the state law in regard to the conveyance or leasing of the homestead prevent or hinder in any way the Secretary of the Interior from exercising his full power and authority under the laws of Congress referred to? It appears to us that they do not. We cannot see why the pro-

visions of both state and federal law may not be given full force. Both provisions have for their object the same ultimate result. If the renewal lease had been executed by Pearl Chisholm, it still would have been subject to the approval of the Secretary of the Interior; and it is nowhere claimed that the approval of the Secretary, standing alone, would make a contract between the contracting parties. A valid contract must have been made by the parties themselves so that, when it was presented to the Secretary of the Interior for his approval, it might come in the form of a valid contract made between the parties, but subject to the approval of the Secretary before it should become effective. In the present instance the alleged contract came to the Secretary in the form of a lease, but void under the laws of Oklahoma. The Secretary's approval could not remedy the want of power in Webster Chisholm to make the lease. We think the case of *Jennings* v. *Wood, et al.*, 192 Fed. 507, 112 C. C. A. 657, decided by this court, is very much in point. In the case cited it was held that under section 72, heretofore quoted in this opinion, the approval of the Secretary would not validate a lease which was invalid because the lessor was a minor and not competent to make it. In delivering the opinion of the court in the case cited, Judge Hook used the following language:

> "The jurisdiction of the Secretary of the Interior is only that expressed in the Acts of Congress. He was not constituted the general

guardian of the estates of the Indians in the sense in which that term is usually employed. Power was not confererd upon him to originate and make leases of allotted lands. That was left to the Indians subject to his approval in specified cases. If an Indian did not desire to lease, there was nothing for the Secretary to act upon; if he did, and the lease was for oil and gas, its validity depended on the approval of that official, but he was not one of the contracting parties. On the contrary, his connection with the transaction and his authority first arose after the minds of the contractors came together, and they must have been competent to make the contracts submitted for approval. A disapproval was merely a veto. An approval which proceeds upon a consideration of the terms of the instrument offered and whether they are reasonably for the interests of the Indian was intended as an additional safeguard to his protection. It would not, however, reach back and supply or confirm the essential, legal prerequisites of a valid contract."

The present case is not similar to the case of *Blansett* v. *Cardin, et al.*, 261 Fed. 309, decided by this court and affirmed by the Supreme Court May 16, 1921, 256 U. S. 319, 41 Supt. Ct. 519, 65 L. ed. 590. In the *Blansett* case the regulations of the Secretary of the Interior authorized by Congress provided that an Indian married woman could by will dispose of all of her allotted land. A law of Oklahoma provided that no woman while married should bequeath more than two-thirds of her property away from her husband. It was decided that in

that case the provisions of the law of Oklahoma restricting the right of a married Indian woman to dispose of her property by will was repugnant and inconsistent with the rights conferred by the regulations of the Secretary of the Interior. In such a case, of course, the conclusion reached by this court was correct, as the regulations of the Secretary of the Interior, having been made by the authority of Congress, had the force of law, and were deemed made for the protection of the Indians and their property, during the period of restriction on alienation. By section 1 of the Act of May 27, 1908, *supra*, the restriction on 50 acres of the land in controversy was removed, so at the time the renewal was made only 30 acres of the land was restricted and the Cherokee Agreement and the Act of 1908 only refer to restricted lands, therefore 50 acres were subject only to the laws of Oklahoma, and the renewal lease would be void as to those acres in any event and we are of the opinion that it was void as to all, because the parties to the pretended renewal contract had no contract to present to the Secretary of the Interior for approval. We do not think the regulations quoted in this opinion as applicable to cases where part of the lands subject to an oil and gas lease have been removed, have the effect to reimpose a restriction which Congress had removed. We take the regulation to mean that, if the parties do not agree upon any other way for accounting for the oil, gas or mineral from the re-

stricted lands separate from the unrestricted lands they will be deemed to have consented that the Secretary of the Interior still shall have that duty to perform. Before the State of Oklahoma could be admitted to the Union, its constitution, especially where the rights of the United States or of the Indian tribes in Oklahoma were concerned, had to be accepted by the United States. There was a provision of the Constitution of Oklahoma (section 1, article 12) that nothing in the laws of the United States or any treaties with the Indian tribes in the state should deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the state.

2. This court will take judicial notice that a large portion of the citizens of the Territory of Oklahoma and the Indian Territory who framed the Constitution of Oklahoma were Indians who owned their own homes and lands, and this provision of the constitution was undoubtedly placed in the constitution by such Indian citizens for their own protection. This we think is a legitimate argument to make in favor of the proposition that Congress never intended by law or regulation to deprive any Indian or other allottee in Oklahoma of the benefit of the homestead and exemption laws of the state. The use of the words "homestead" and "surplus" in allotments made to Indians was in order to classify the lands. The real homestead which a citizen of

Oklahoma is entitled to is created by the laws of the state.

3. It is next claimed that appellees are estopped from claiming that the renewal lease is void. Webster Chisholm received all the royalties accruing in the original lease and the attempted extension thereof, but his wife, Pearl Chisholm, received no part thereof. The trial court found that after the expiration of the lease of May 14, 1904, which was May 14, 1919, the land produced $22,944.40 of oil for the period of about seven months, and Webster Chisholm received the stipulated royalty on this oil, and therefore the court denied him any portion of the value of the oil except the royalty. We do not think that an estoppel as to the land can be urged against the appellees, for the reason that Pearl Chisholm, the wife of Webster Chisholm, had no knowledge of the renewal lease dated March 9, 1914, no knowledge of the operation of the lessee under the same, and in no way directly or indirectly encouraged the lessee in such operation. Appellants obtained this renewal lease more than five years before the expiration of the original lease. Any operations of the appellants in the production of oil would not attract the attention of any one knowing that the original lease did not expire until 1919. In addition to the lack of knowledge on the part of Pearl Chisholm, against whom estoppel is urged, there is an entire absence of evidence on the part of appellants that

they would not have done the things they did, but for the conduct of the parties sought to be estopped.

Counsel for appellants further urged that, in case the court should be of the opinion that the renewal lease was void, and that the appellants are not estopped, the court, as a court of equity having full control of the case, ought to mold the relief so as to give appellees the possession of their homestead, but still at the same time grant to the appellants the right to extract oil under the renewal lease, as that would not interfere with the homestead rights of appellees. If the renewal lease is void, and we decided that it was and is, this court has no power to confer any rights upon the appellants and thus violate on its part the laws of Oklahoma.

We are clearly of the opinion that the judgment of the lower court holding the renewal lease void, was correct, and its judgment is affirmed.

Exhibit B.

In the United States Circuit Court of Appeals for the Eighth Circuit.—Sperry Oil & Gas Company, et al., Appellants, v. Pearl Chisholm, et al., Appellees.—No. 6017.—On Appeal From the United States District Court of the Eastern District of Oklahoma

ORDER.

The above cause was argued, submitted and decided at the May term, 1922, of this court. The ap-

pellants filed a motion for rehearing. The United States, who are not parties to the cause, subsequently filed a motion for leave to file brief as *amicus curiæ* in support of the motion of appellants. The Mid-Continent Oil and Gas Association, not a party to the cause, filed a similar motion. Appellants have filed a motion for leave to re-argue the case orally upon the petition for rehearing. It is manifest that if one party is allowed to file a brief as *amicus curiæ*, all must be permitted to do so who apply and appellees will be entitled to answer.

This court has reached a decision that it believes to be correct. The case is of such importance that it will eventually reach the Supreme Court in any event if the record shows error in our decision. Therefore, in view of the facts above recited, and after due consideration of the several motions mentioned, it is ordered that said several motions be and they are hereby denied.

October 21, 1922.

FILED
JAN 2 1924
WM. R. STANSBURY
CLERK

No. 164

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1923

SPERRY OIL AND GAS COMPANY AND OKLAHOMA PRODUCING & REFINING CORPORATION OF AMERICA, (Appellants), - - - - Petitioners,

vs.

PEARL CHISHOLM AND WEBSTER CHISHOLM, (Appellees), - - - - - - - - Respondents

STATEMENT OF CASE, AND BRIEF OF ARGUMENT ON BEHALF OF RESPONDENTS

J. Howard Langley,
Harve N. Langley,
S. R. Lewis,
O. S. Booth,

Solicitors for Respondents.

C.-C. TYPEWRITING CO., TULSA

INDEX

Page

STATEMENT 1

BRIEF OF ARGUMENT 4

The homestead and exemption laws contained in the Constitution and Statute laws of Oklahoma apply to tribal surplus and homestead allotments of restricted and unrestricted Indians, within the state, not to exceed one hundred sixty acres, such laws having been adopted, made locally applicable and given Federal force by the Oklhoma Enabling Act 4

The extension agreement or lease, dated March 9, 1914, executed by the husband alone, not joined in nor consented to by the wife, covering the homestead of the family, as defined by the Constitution and laws of Oklahoma, adopted and put in force by Enabling Act, is void 20

Pearl Chisholm, wife of allottee, having no knowledge of the execution or extension of lease of March 9, 1914, and no knowledge of the operations by lessee thereunder, and having in no way directly or indirectly encouraged or caused the lessee in such operations, is not estopped, nor is her husband estopped, to assert invalidity thereof 23

The Secretary of the Interior can only exercise such power as is specifically delegated to him by Federal Laws in relation to Indian lands, and he has no power to originate contracts, having only the power of approval or veto, and the approval by the Secretary of the Interior of an oil and gas lease does not cure any fatal defect in such instrument required by Federal laws or State laws made applicable by Congress 28

Authorities Cited

Act June 16, 1906, 34 Stat. L. 267 5

Act Feb. 8, 1887, 24 Stat. L. 388 4

Act June 21, 1906, 34 Stat. L. 325 5

Act May 27, 1908, 35 Stat. L. 312 ..... 2, 13, 31, 34

Constitution of Oklahoma, Arts. 3, 12 and Schedule Section 2 7

Revised Statutes of Oklahoma, 1910, Secs. 3343, 3342, 6328, 6330, 1143 8

Wilson's Revised Statutes of Oklahoma, 1903, Secs. 2986, 2985, 880 5

INDEX—Continued

Page

Alton Mctl. Co. v. *Spindel*, 140 Pac. 1168 22
Ashton v. *Noble*, 46 Okla. 297, 148 Pac. 1042 18
Beam v. *U. S.*, 162 Fed. 260 15
Belt v. *Bush*, 176 Pac. 935 14-21
Brusha et al. v. *Board of Education*, 41 Okla. 595, 139 Pac. 296 27
Blansett v. *Cardin*, 256 U. S. 319, 65 L. ed. 950, 41 Sup. Ct. 519 33
Carter Oil Co. v. *Popp*, 17 Pac. 747 21
Cherokee Nat'l Bk. v. *Riley*, 155 Pac. 1140 21-26
Clark 1. *Collidge*, 8 Kan. 189 27
Condit v. *Condit*, 168 Pac. 456 27
Crosbie v. *Brewer*, 158 Pac. 388 29
Cump v. *Kiyo*, 104 Wis. 656, 80 N. W. 937 26
Duniels v. *Tierney*, 102 U. S. 415 27
Debenture v. *Hopkins*, 63 Kan. 678, 66 Pac. 1015 27
Dickson v. *Luck Land Co.*, 242 U. S.371, 375 29-33
Fink, U. S. Marshal, v. *O'Neil*, 106 U. S. 275, 27 L. ed. 196 36
Francen v. *Okla. Star Oil Co.*, 194 Pac. 193 22
Goldsborough v. *Hewett*, 99 Pac. 991 22
Gooch v. *Gooch*, 38 Okla. 300, 133 Pac. 242 22
Goudy v. *Meath*, 203 U. S. 146, 27 Sup. Ct. 48, 51 L. ed. 130 12
Gray v. *Zellner*, 66 Kan. 514, 72 Pac. 228 27
Hall v. *Powell*, 57 Pac. 168 22
Heckman v. *Davis*, 155 Pac. 170 27
In re Haff, 197 U. S. 488 4
Hunter v. *Griffith*, 72 Pac. 363 22
Hyde v. *Ishmael*, 42 Okla. 279, 143 Pac. 1044 .....
Jefferson v. *Fink*, 247 U. S. 288, 62 L. ed. 1117 13
Jefferson v. *Winkler*, 26 Okla. 653 16
Jennings v. *Wood*, 192 Fed. 507, 112 C. C. A. 657 28-31-32
Kelley v. *Mosby*, 124 Pac. 984 22
Ketchum v. *Duncan*, 96 U. S. 659, 24 L. ed. 868 28
Kirk v. *Hamilton*, 102 U. S. 68, 26 L. ed. 79 28
Kirkpatrick v. *Burgess*, 29 Okla. 121, 116 Pac. 764 16
Land Co. v. *Wea*, 43 Kan. 518 22
2 Lewis's Sutherland Stat. Constr., 2nd ed. p. 789 15
Limerick v. *Lee*, 87 Pac. 859, 17 Okla. 165 27
McCrary v. *Miller*, 78 Okla. 16, 184 Pac. 782 22
McCurry v. *Sledge*, 149 Pac. 1124 22
McWhorter v. *Brady*, 140 Pac. 782 22
Montana v. *Rice*, 204 U. S. 291, 27 Sup. Ct. 281, 51 L. ed. 490 12
Morris v. *Ward*, 5 Kan. 239 12

INDEX—Concluded

	Page
Norton v. *Kelley*, 57 Okla. 222, 156 Pac. 1164	20
Nowata Gas Co. v. *Henry Oil Co.*, 269 Fed. 742	26
Palmer Oil & Gas Co. v. *Parrish*, 59 Pac. 640	22
Palmer v. *Parrish*, 61 Kan. 311	22
Peterson v. *Skidmore*, 195 Pac. 600	26
Pettis v. *Johnson*, 190 Pac. 681	22
In re Pigeon's Estate, 198 Pac. 309	14
Romine v. *State*, 7 Wash. 215, 34 Pac. 924	12
Ruling Case Law, Vol. 10, p. 693	27
Shanks v. *Norton*, 191 Pac. 170	22
St. L. & S. F. R. Co. v. *Mann*, 192 Pac. 231	26
Thompson v. *Millikan*, 172 Pac. 534	26
Treese v. *Shoemaker*, 80 Okla. 235, 195 Pac. 767	22
Truskett v. *Closser*, 236 U. S. 223	16
U. S. v. *Greathouse*, 166 U. S. 603	16
Utah Power & Light Co. v. *U. S.*, 243 U. S. 389-405	15
Walker v. *Brown*, 43 Okla. 144, 141 Pac. 681	17
Wea v. *Franklin Land Co.*, 54 Kan. 533	22
Whelan v. *Adams*, 44 Okla. 696, 145 Pac. 1148	22
William Halsell Frazier Co. v. *King*, 158 Pac. 1142	27
Wilson v. *Morton*, 29 Okla. 475, 119 Pac. 213	17
Withers v. *Love*, 83 Pac. 204	26

In The

SUPREME COURT OF THE UNITED STATES

SPERRY OIL & GAS COMPANY, *and* PRODUCING & REFINING CORPORATION OF AMERICA, (Appellants), - - - - - - - *Petitioners,*

vs.

PEARL CHISHOLM *and* WEBSTER CHISHOLM, (Appellees), - - - - - - - *Respondents.*

No. 164

STATEMENT OF FACTS AND ARGUMENT ON BEHALF OF RESPONDENTS

Statement

This action commenced by Pearl Chisholm and Webster Chisholm, to cancel an oil and gas lease dated March 9, 1914, for recovery of value of oils extracted, and enjoining petitioners from interfering with possesion of land involved.

The undisputed facts are. that Webster Chisholm a one-half degree blood Cherokee Indian, was conveyed the 80 acres of lands involed as his tribal allotment, thirty acres being tribal home-

stead allotment, about which more protective restrictions were imposed by Congress, and the fifty acres being tribal surplus allotment, from which 50 acres restrictions were removed by Act of Congress of May 27, 1908, (35 Stat. L. 312). On May 14, 1904, Webster Chisholm, single, when the entire eighty acres was restricted from sale, executed with approval of Secretary of the Interior, an oil and gas lease covering the eighty acres, to run for a period of fifteen years from its date (R. 39). On October 11, 1911, Webster Chisholm and Pearl Chisholm married, and in April, 1912, moved on the 80 acres involved, built a home thereon (R. 31), and have lived thereon continuously since that time, used the entire eighty acrs of land all under one fence (R. 32), and owned no other land, and the eighty acres constituted the homestead of the family within he meaning of the Constitution and Statute Laws of Oklahoma (R. 31-36). Two children blessed their said home (R. 32).

On March 9, 1914, about five years prior to expiration of the 1904 lease, Webster Chisholm executed a stipulation (in effect a new lease) to the assignee of the 1904 lease, in which 1914 lease Pearl Chisholm, the wife, did not join, and of which she had no knowledge (R. 33) until after expiration of life of 1904 lease, and shortly prior to commencement of this suit. The lease (or stipulation) of March 9, 1914, apears at pages 45 to 51 of the Record, and is entirely a new lease, over-lapping.

Five of the eleven wells were drilled aftr March 9, 1914, the last one on October 18, 1917, all within the period of the 1904 lease. The wife, Pearl Chisholm, during all the times after her marriage knew of the lease of 1904, and knew the royalties were being paid thereunder; but, she did not know of the existence of the 1914 lease and did not know of the operations and expenditure of moneys by petitioners thereunder, and did not know of payment of royalties thereunder (R. 33-35).

The trial court held in favor of respondents, cancelling the 1914 lease, and awarding complete possession, but denied recovery of value of oils extracted from expiration of 1904 lease to November 1, 1921 (273 Fed. 489), and on appeal, affirmed by Circuit Court of Appeals (282 Fed. 93). Value of seven-eighths of oil (working interest of lessee) from expiration of 1904 lease to November 1, 1921, for seven months was over $22,000.00 and no showing made for remaining approximate eleven months (R. 38).

The question involved for review and final decision is the validity of the lease of 1914, not joined in nor consented to by the wife of the lessor, covering homestead of the family under Oklahoma laws; and the decision of this Court will not only affect he home of respondents but will involve the peace, happiness and security of thousands of Indian homes in Oklahoma.

Brief and Argument

The homestead and exemption laws contained in the constitution and statute laws of Oklahoma apply to tribal surplus and homestead allotments of restricted and unrestricted Indians, within the State, not to exceed the hundred sixty acres, such laws having been adopted, made locally applicable, and given federal force by the Oklahoma Enabling Act.

Patentees of Indian tribal lands in Indian Territory conferred citizenship in United States. Act Cong. appd. Feb. 8, 1887, General Allotment Act (24 Stat. L. 388, Sec. 6). Amended by Act of Cong. appd. March 3, 1901, which made it read:

> "And • • • every Indian in the Indian Territory is hereby declared to be a citizen of the United States and enitled to all the rights, privileges and immunities of such citizens." (31 Stat. L. 1447). *In re Haff*, 197 U. S. 488.

An interesting report submitted February 28, 1901, by Senate Committee anent the Amendment, reads in part:

> "The independent self-government of the Five Civilized Tribes has practically ceased. The policy of the government to abolish classes in the Indian Territory and make a homogenous population is being rapidly carried out. To enable the Indians of the Indian Territory to protect their *rights*, they should be given the rights of United States citizenship immediately. They should at once be put upon a *level* and *equal footing* with the

> great population with whom they are now intermingled."

The provisions of Act of Cong. appd. June 21, 1906, (34 Stat. 325) being an amendment to Section 6 of General Allotment Act, *supra*, do not apply to "Indians in the Indian Territory," Congress thereby evidencing an explicit intention not to molest the citizenship heretofore conferred.

The Enabling Act (34 Stat. L. 267) admitting Oklahoma into the Union, approved June 16, 1906, Section 21, provides:

> "* * * and all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State except as modified or changed by this Act or by the Constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States."

At time of admission of Oklahoma into the Union, the Wilson's Revised Statutes of Oklahoma, 1903, were in force in Territory of Oklahoma.

The Enabling Act, *supra*, Sec. 1, provides:

> "That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided; *Provided*, that noth-

ing contained in the State Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished), or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

The Enabling Act, *supra*, Sec. 2, provides in part:

"That all male persons over the age of twenty-one years who are citizens of the United States, or who are members of any Indian Nation or tribe in said Indian Territory and Oklahoma, and who have resided within the limits of said proposed state for at least six months next preceding the election, are hereby authorized to vote and choose delegates to form a constitutional convention for said proposed State."

The Enabling Act, *supra*, Sec. 13, provides in part:

"* * * and, that the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to the said State until changed by the Legislature thereof."

The Enabling Act, Section 2, provides:

"* * * And the United States courts of said Indian Territory shall have the same powers

to enforce the laws of said Territory of Oklahoma, hereby extended to and put in force in said Territory, as have the courts of the Territory of Oklahoma * * *."

The Constitution of Oklahoma, Sec 1, Art. 12 (Williams Sec. 302) defines the "homestead of any family" as follows:

> "The homestead of any family in this State not within any city, town, or village, shall consist of not more than *one hundred sixty acres of land* which may be in *one or more parcels*, to be selected by the owner. * * * *That nothing in the laws of the United States, or any treaties with the Indian Tribes in the State, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the State.*"

This provision enacted by the Legislature, Revised States of Oklahoma, 1910, Section 3343. Substantially Sec. 2986, Revised Statutes of Oklahoma 1903.

The Constitution of Oklahoma, Sec. 2, Art. 12 (Williams 303) provides:

> "The homestead of the family shall be, and is hereby protected from forced sale for the payment of debts, except for the purchase money * * * *nor shall the owner if married sell the homestead without the consent of his or her spouse given in such manner as may be prescribed by law.*"

The Revised Statutes of Oklahoma, 1910, Sec. 3342 (substantially re-enactment of Sec. 2985 Wilson's Revised Statutes of Oklahoma 1903) provides:

> "The following property shall be reserved to the head of every family residing in the state exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided:
>
> First, the homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife."

Other exemptions follow. Only exceptions being for purchase money and taxes.

The Revised Laws of Oklahoma, 1910, Sec. 6328, provide:

> "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead, which shall not in any event be subject to administration proceedings, until it is otherwise disposed of according to law; and upon death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age * * *.
>
> The Executor or Administrator must make a separate inventory of all the property specified in this section * * * and no such property shall be liable for any prior debts or claims whatever."

The Revised Statutes of Oklahoma, 1910, Sec. 6330, provide:

> "The homestead is not subject to the payment of any debt or liability conracted by or existing against the husband or wife, or either of them, previous to or at the time of the death of such husband or wife, except such as are secured by liens thereon, as provided in the laws relating to homestead."

The Constitution of Oklahoma, Sec. 2, Schedule provides:

> "All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall extend to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law."

The Constitution of Oklahoma, third proviso, Sec. 1, Art. 3, provides:

> "That male persons of Indian descent native of the United States are qualified electors if otherwise qualified."

Respondents believe that Courts will take judicial knowledge that the inhabitants of the two territories making Oklahoma accepted the terms and proposals of the Enabling Act, made by Congress for Statehood, as appears by the Constitution, and by authority of the Act itself the President of the United States on November 16, 1907,

issued proclamation admitting the state, approved the Constitution as being harmonious with the Federal Constitution, the principles of the Declaration of Independence and Federal laws, and that a large portion of the inhabitants of the two territories were of Indian descent, and that they participated in the formulation of the Constitution and accepted and construed the Enabling Act as conferring upon them the "benefit of the homestead and exemption laws then in force in Territory of Oklahoma" as inviolate in return for their acquiescence in and ratification of the proposal for statehood, which conclusively appears in the Constitution of Oklahoma, Sec. 1, Art. 12, third proviso, viz:

> "Nothing in the laws of the United States or in the treaties with Indian tribes in the state shall deprive any Indian, or other allottee, of the benefit of the homestead and exemption laws of the State."

Evidently, as it applies only to Indian inhabitants, they accepted the enabling Act as conferring upon them the protection of this specific provision as inviolate and not subject to change.

We find no provision of the Enabling Act modifying the applicability to Indians of the benefit of homestead and exemption laws aforesaid. Was a more solemn treaty or agreement ever entered into by the parent government and the Indians of the state than is set forth in the Enabling Act

putting in force and conferring upon them the protection of homestead and exemption laws and their acceptance and specific mention of that provision in the state Constitution? Is there a more fundamental principle of our form of government than the protection of the home, and is here a subject of law more liberally construed, and upheld by the Courts? Ultimately it appears that the laws in force in Territory of Oklahoma at statehood, not modified by the Enabling Act, were adopted and made locally applicable in the new state by the federal government and also by the inhabitants of the state. (Enabling Act, Secs. 13 and 21, Constitution, Sec 2, schedule, *supra*). Is there any conflict or discord between the provisions of state laws conferring "benefit of homestead and exemption laws" upon the Indian homes and previously enacted or subsequently enacted federal laws? If there is, should they not both be given effect, having common intent—protection of the Indian home? Recognition given to and adoption of laws of Territory of Oklahoma by Congress in Enabling Act, *supra*. (*Jefferson* v. *Fink*, 247 U. S. 288, 62 L. Ed. 1117.)

The above quoted federal enactments, the adoption of the Constitution of Oklahoma and enactment of State Laws, were all enacted after the execution of he 1904 lease, and prior to execution of the 1914 lease.

"The homestead was not intended for the

> play and sport of capricious husbands merely, nor can it be made liable for his weakness or misfortune. It was not established for the benefit of the husband alone, but for the benefit of the family and of society, to protect the family from destitution and siciety from the danger of her citizens becoming paupers." (*Morris* v. *Ward*, 5 Kan. 239.)

In *Fink* v. *O'Neil*, 106 U. S. 275, 27 L. Ed. 196, it was held that the homestead of the family was exempt from seizure and sale on a judgment in favor of the United States, the Statutes of Wisconsin exempting the homestead. The case closes with the language:

> "By parity of reasoning, based on the declared public policy of the States, where the people are the sovereign, laws which are acts of preservation of the home and family, exclude supposition of any adverse public interest, because none can be thought hostile to that * * * for civilization has no promise that is not nourished in the bosom of the secure and well ordered household."

The members of the Indian Tribes of Oklahoma became vested with full protection of the civil and criminal laws of the State of Oklahoma.

—*Goudy* v. *Meath*, 203 U. S. 146, 27 Sup. Ct. 48, 51 L. Ed. 130;

—*Montana* v. *Rice*, 204 U. S. 291, 27 Sup. Ct. 281, 51 L. Ed. 490;

—*Romine* v. *State*, 7 Wash. 215, 34 Pac. 924.

In the case of *Jefferson* v. *Fink*, 247 U. S. 288, 62 L. Ed. 1117, it was held:

> "By the Enabling Act of June 16, 1906, (34 Stat. L. 267), provision was made for admitting into the Union both the terriory of Oklahoma and the Indian Territory as the State of Oklahoma. Each territory, as we have seen, had been put in force there by Congress. Those in the Territory of Oklahoma had been enacted by the Territorial Legislature. Deeming it better that the new state should come into the Union with a body of laws applying with practical uniformity throughout the state, Congress provided in the Enabling Act (Section 13) that 'the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof'; and also Section 21, that 'all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this Act or by the Constitution of the State.' * * *.
>
> The state was admitted into the Union November 16, 1907, and thereupon the laws of the territory of Oklahoma relating to descent and distribution (Oklahoma Revised Statutes, 1903, C. 86, Art. 4) became laws of the state. Thereafter Congress by the Act of May 27, 1908 (35 Stat. L. 312, C. 199, Sec. 9) recognized and treated 'the laws of descent and distribution of the State of Oklahoma' as applicable to members of the Five Civilized Tribes."

The Oklahoma Supreme Court in *In Re Pigeon's Estate*, 198 Pac. 309, held "That Congress intended by extending the laws of territory of Oklahoma in force throughout the state that said laws were to be applicable to Indians and their estates," and that to hold otherwise "is to repudiate the very doctrine announced in the case of *Jefferson* v. *Fink*, *supra*.

In *Belt* v. *Bush*, 176 Pac. 935 (Okla.), cited page 30, petitioners' brief, it was held that the homestead and exemption laws of Oklahoma applied to the restricted land of a full-blood Indian. The wife was adjudged the benefit of homestead and exemption laws though the dwelling was not on the allotment, which discovery was made about the time of death of allottee. The location of the dwelling on any particular subdivision of the land surely would not act as a waiver of homestead rights to remainder of the tract, since it would ultimately follow that only the particular space occupied by the dwelling could be protected as the homestead.

The numerous authorities cited in petitioners' brief (p. 26-7) relate to the validity of conveyances procured from Indian citizens of the state covering their allotments, which conveyances were in violation of expressed terms of federal laws, and the doctrine announced in all those cases carry out the modern policy of the parent government, based upon federal laws of protecting the Indians

in their possession and enjoyment of their individual allotments, and involve the "modifications" made as to the applicability of the State laws in the Enabling Act, and in no instance is there involved any question that could apply to the case at bar, since there is a decided silence in the Enabling Act and all other federal laws depriving the Indians of Oklahoma of the benefit of the homestead and exemption laws of the State.

The state laws have force when adopted and made applicable by Congress to persons and property of Indian citizens.

> —*Utah Power & Light Company* v. *United States*, 243 U. S. 389-405;
>
> —*Beam* v. *United States, et al.*, 162 Fed. 260;
>
> —*Jefferson* v. *Fink*, 247 U. S. 288, 62 L. Ed. 1117.

> "Where the adopting statute makes no reference to any particular act, by its title or otherwise, but refers to the general law regulating the subject in hand, the reference will be regarded as including not only the law in force at the time of the adopting statute but also that in force when the action is taken or the proceeding resorted to." (2 *Lewis's Sutherland, Stat. Constr.* 2nd Ed., p. 789).

All federal legislation anent the Indian tribes was for their protection, to further their progress in life, and the adoption and putting in force of laws of Territory of Oklahoma, not modified or

changed by the Enabling Act, and not impairing the rights of persons or property of the Indians, and not absolutely irreconcilable with federal laws, effect should be given to both, they having for their common purpose, the maximum protection of the Indian home. *United States* v. *Greathouse*, 166 U. S. 603.

Petitioners in their brief (p. 34) seek to apply the doctrine announced in *Truskett* v. *Closser*, 236 U. S. 223. In that case the Court held that the Oklahoma District Court could not confer the rights of majority upon an Indian allottee so as to make the allottee's deed or lease on the allotment valid while yet a minor as shown by the enrollment records of the Five Civilized Tribes as provided for in Act of May 27, 1908 (35 Stat. L. 312, Chap. 199). In other words, there was an expressed contradiction between the federal and local laws. Of course, the federal should and did prevail.

Petitioners in their brief (p. 35) cite *Jefferson* v. *Winkler*, 26 Okla. 653. In that case an Indian girl married when she was under eighteen, and while under age conveyed her tribal allotment. It was held that under the local laws of Oklahoma marriage emancipated her, but that notwithstanding her conveyance to tribal allotment was void, the Act of Congress of May 27, 1908, making the enrollment records aforesaid conclusive evidence of her age (35 Stat. L. 312, chap. 199).

Petitioners in their brief (p. 35) cite *Kirkpat-*

rick v. *Burgess*, 29 Okla. 121, 116 Pac. 764. In that case the Court held that the marriage of the tribal allottee did not emancipate her under local laws, but that the county court retained jurisdiction until the allottee became of age as provided by the Act of Congress of May 27, 1908, making the enrollment records aforesaid conclusive evidence of her age.

Petitioners in their brief (p. 35) cite *Wilson* v. *Morton*, 29 Okla. 475, 119 Pac. 213. In that case the Court held that the congressional act relating to how the interest of a minor should be disposed of in lands inherited prevailed over local laws. Another expressed conflict between laws and local laws, and the federal law rightfully prevailed.

Petitioners in their brief (p. 35) argue the case of *Walker* v. *Brown*, 43 Okla. 144, 141 Pac. 681. Their illustration is not supported by the authority. A member of the Five Civilized Tribes (Seminole) made a will affecting her restricted allotment. At that time a local providing that—

> "No person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath same by will."

The Court held that the will was good, because the Act of Congress approved May 26, 1906, authorized the making of such will. The federal law being in expressed conflict with the local law rightfully prevailed.

Petitioners in their brief (p. 36) argue the case of *Ashton* v. *Noble*, 46 Okla. 297, 148 Pac. 1042. The case merely holds that the local champerty laws cannot give to the party unlawfully in possession of an Indian restricted allotment any rights.

If the benefit of homestead and exemption laws of Oklahoma do not apply to restricted Indian lands, could not the Indian allottee, the record owner of the land, in his or her most capricious moments, under temporary domestic dissatisfaction, unalert to the full effect of such act, without the joint consent, advice and consultation of the spouse, and against the interests of the offspring and home, in the hands of evil and designing persons, with the approval of a Secretary of the Interior who failed to make proper survey of the interests of the home, convey and incumber the family homestead and thus destroy it?

The Enabling Act putting in force in the state the homestead laws quoted, deprived the Secretary of the Inerior of a voice as to what was best for the Indian home, leaving it with the husband and wife, who have a common interest in the family and its home. To deprive the Indians of Oklahoma of the benefit of the homestead and exemption laws would curtail their citizenship, lessen their enjoyment of state rights, enjoyed by their pale-faced neighbor; would disincline any Indian or white person with marital relations with the Indian tribal

allotment owner because of the lack of the protection of the home by such laws, and would be adverse to the modern policy of the parent government in the exercise of its guardianship. It would be adverse to the expressed interpretation of the Enabling Act by the Indians of Oklahoma in their acceptance of statehood and their expressed declaration in the Constitution of the State of the benefit of such law.

Upon admission of the state practically all of the land was owned by members of the Indian Tribes of Indian Territory, they were most vitally affected, and the adoption of the Territory of Oklahoma laws was for their protection and benefit. No institution on earth should be more interested in the home, and its accomplishments, than the United States Government. Universally all the states have homestead and exemption laws, for the protection of the home, and all Constitutions and laws, as supported by innumerable decisions, are all predicated upon the supreme enforcement of that protection from the numerous means and agencies which would destroy it.

If it was the intent of Congress not to bestow upon the Indians of Oklahoma the benefit of the homestead and exemption laws, it could have, when enacting the Enabling Act, so modified the application of the laws of Oklahoma Territory, as it did in reference to the application of many of the provisions of such laws, or it could have subse-

quently so provided in one of the many protective laws enacted regulating the affairs of the tribes of Indians in the state.

We find nothing in the Enabling Act which modified, or made inapplicable the local laws extending the benefit of the homestead and exemption laws to Indian inhabitants, and no previously or subsequently enacted federal law modifying its application, and no conflict between the local laws and the federal law, but on the other hand a most harmonious and common intent between both laws of equal protection of the Indian home with other homes of the state. There is a decided absence in any of the decisions of the Courts holding the local law inapplicable where it affords a greater protection to the Indian citizen than the federal laws.

Under the Oklahoma Constitution and Statute laws the tribal homestead and surplus allotment of Indians may constitute the family homestead, not to exceed 160 acres.

—*Bell* v. *Bush*, 176 Pac. 935;

—*Norton* v. *Kelly*, 156 Pac. 1164, 57 Okla. 222;

—*Hyde* v. *Ishmael*, 145 Pac. 1044, 42 Okla. 279.

Respondents seek protection of both federal and state laws over their home, and both such laws having for their purpose a common purpose, should be harmonized and effect given to both.

II.

The extension agreement or lease, dated March 9, 1914, executed by the husband alone, not joined in nor consented to by the wife, covering the homestead of the family, as defined by the constitution and laws of Oklahoma, adopted and put in force by Enabling Act, is void.

The Enabling Act, *supra*, adopted and put in force in the State of Oklahoma, Section 880 of Wilson's Revised Statutes of Oklahoma, 1903, which provides:

> "* * * and no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period of not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced, except to the extent hereinafter provided."

Section 1143 Revised Statutes of Oklahoma, 1910, is a re-enactment of the above section, with the addition of the words "or legally separated," and this law was in force at time of the execution of the lease of 1914.

It has been universally held by the Oklahoma Supreme Court that an oil and gas lease is such a contract that requires joint execution of both husband and wife, where it covers the homestead of the family.

—*Carter Oil Co.* v. *Popp*, 17 Pac. 747;

—*Cherokee Nat'l Bank* v. *Riley*, 155 Pac. 1140;

—*Shanks* v. *Norton*, 191 Pac. 170;

—*Francen* v. *Okla. Star Oil Co.*, 194 Pac. 193.

Any contract relating to the homestead, except a lease for not to exceed one year, unless in writing and joined by both husband and wife, is void.

—*McCrary* v. *Miller*, 78 Okla. 16, 184 Pac. 782, 186 Pac. 1089;

—*Treese* v. *Shoemaker*, 80 Okla. 235, 195 Pac. 767;

—*Land Co.* v. *Wea*, 43 Kan. 518;

—*Palmer* v. *Parrish*, 61 Kan. 311;

—*Wea* v. *Franklin Land Co.*, 54 Kan. 533;

—*Alton Mctl. Co.* v. *Spindel*, 140 Pac. 1168;

—*Hunter* v. *Griffith*, 72 Pac. 363;

—*Palmer Oil & Gas Co.* v. *Parrish*, 59 Pac. 640;

—*Whelan* v. *Adams*, 44 Okla. 696, 145 Pac. 1148;

—*Gooch* v. *Gooch*, 38 Okla. 300, 133 Pac. 242;

—*Goldsborough* v. *Hewett*, 99 Pac. 991;

—*Hall* v. *Powell*, 57 Pac. 168;

—*Kelley* v. *Mosby*, 124 Pac. 984;

—*McWhorton* v. *Brady*, 140 Pac. 782;

—*McCurry* v. *Sledge*, 149 Pac. 1124;

—*Francen* v. *Okla. Star Oil Co.*, 194 Pac. 193;

—*Pettis* v. *Johnson*, 190 Pac. 681.

III.

Pearl Chisholm, wife of allottee, having no knowledge of the execution or existance of the lease of March 9, 1914, and no knowledge of the operations ...ssee thereunder, and having in no way directly or indirectly encouraged or caused the lessee in such operations, is not estopped, nor is her husband estopped, to assert invalidity thereof.

The only oral testimony is that of Pearl Chisholm (R. 30-37). On cross examination (R. 33 34) she testified she knew of the lease of 1904, and had no knowledge of lease of 1914 until shortly prior to commencement of this action when seeking to get the 1904 lease back. (Findings Trial Court. R. p. 28). The Trial Court (R. 27, near bottom) found:

> "* * * that the plaintiffs moved upon the lands involved in this cause in the spring of the year 1912, and then and there the state homestead status attached hereto, and that they have continuously and uninterruptedly since then and to this time occupied the aforedescribed land as their home and homestead under the state laws; * * * and was such homestead at the time of the supplemental contract was executed by Webster Chisholm."

The Trial Court further found (R. 29) end first paragraph:

> "The Court finds that the wife, Pearl Chisholm, at no time received any part of said royalty and did not know of the supplemental

contract until in the summer of 1919." (Supplemenal contract refers to lease of 1914.)

Was it fair to the wife and children of this Indian allottee for petitioners to negotiate personally with the husband, Webster Chisholm, for the lease of 1914 and not a word to the wife thereabout? Did the petitioners suspect that this wife possessed super-intelligence and were they afraid to approach her for her consent to the 1914 lease, fearing her advice, she knowing the value of the land for oil when the 1904 lease expired? Trial Court found the land produced $22,944.40 of oil for seven months, and no value is found for next eleven months prior to trial, respondents being denied recovery of value of the working interest of petitioners (7/8ths) in the lease up to trial, holding the acceptance by Webster Chisholm of the one-eighth royalty from expiration of 1904 lease up to the trial, estopped him from claiming remainder. Have petitioners been so materially damaged? Have they not secured the oil even beyond the date of their 1904 lease? Are the hands of this wife, who was innocent of the existence of 1914 lease (and who had every right to believe petitioners were operating under the original lease of 1904) so unclean, and the petitioners so spotless? On the one hand we have the mother, whose loyalty to her husband and their off-spring is paramount, protecting her home. On the other hand, we have an oil producing company, who

secures a lease in 1904 and drills a few wells, and waits until about five years of the expiration thereof, and without any consideration secures an over-lapping new lease from the husband alone, and drills additional wells "in the very shadow of the family home" without even so much as to advise this wife of the new lease, or that they were operating under a lease other than the 1904 lease. Did petitioners, in securing the 1914 lease from the husband alone, have the interest of and extending fairness to this Indian home? No proof offered that petitioners attempted to secure consent of the wife to the 1914 lease, nor did they prove that *but* for the *new lease they would not have drilled the additional five wells* (drilled after March 9, 1914, and before May 14, 1919). There is nothing in the record to impart to anybody any information that petitioners drilled those five wells under any authority other than the lease of 1904, or that they did anything that would not have been done under the lease of 1904.

There is no principle of law so well established as the party claiming the benefit of estoppel must affirmatively show that the actions performed by him would not have been done but for the actions and attitude of the party against whom estoppel is sought. Unquestionably Pearl Chisholm, without knowledge of this new lease, did not encourage petitiners to expend money in improvements under it.

Many splendid and correct statements of law, and authorities appear in petitioners' brief on this question, but are not applicable here because two of the main elements of estoppel are wanting, viz:

(1) Lack of knowledge on the part of the party against whom estoppel is sought, and

(2) Absence of proof by the party claiming estoppel that it would not have done the things it did but for the conduct of the party sought to be estopped.

As we view the doctrine of estoppel, their plea must utterly fail for want of those two elements.

"An estoppel cannot be set up against a party ignorant of the true state of affairs, or whose conduct was based on mistake."

—*St. L. & S. F. R. Co.* v. *Mann*, 192 Pac. 231 (Okla).

—*Nowata Gas Co.* v. *Henry Oil Co.*, 269 Fed. 742.

—*Camp* v. *Kiyo*, 104 Wis. 656, 80 N. W. 937.

—*Thompson* v. *Millikan*, 172 Pac. 534.

—*Withers* v. *Love*, 83 Pac. 204, (Kans).

—*Peterson* v. *Skidmore*, 195 Pac. 600 (Kan.)

—*Cherokee National Bank* v. *Riley*, 155 Pac. 1140 (Okla.)

In *Peterson* v. *Skidmore*, *supra*, the Court says:

"A party pleading an estoppel in *pias* must show (1) that the opposing party has made some representations inconsistent with his present attitude; (2) that the representation so made was known to the maker to be false; (3) that the pleader did not know that the representation was fale; (4) that he believed it to be true and acted upon such belief."

—*Clark* v. *Collidge*, 8 Kan. 189.

—*Debenture* v. *Hopkins*, 63 Kan. 678, 66 Pac. 1015.

—*Gray* v. *Zellmer*, 66 Kan. 514, 72 Pac. 228.

—*Ruling Case Law*, Vol. 10, p. 693.

—*William Halsell Frasier Co.* v. *King*, 158 Pac. 1142.

—*Condit* v. *Condit*, 168 Pac. 456.

—*Heckman* v. *Davis*, 155 Pac. 1170.

—*Limerick* v. *Lee*, 87 Pac. 859, 17 Okla. 165.

In *Brusha et al.* v. *Board of Education*, 11 Okla. 595, 139 Pac. 296, and *Daniels* v. *Tierney*, 102 U. S. 415, cited in petitioners' brief (p. 41) not applicable to the instant case, since those estopped knowingly received benefits, and the essential elements of equitable estoppel noticeably lacking.

In the instant case the wife had no knowledge of the 1914 lease. Petitioners possessed all the facts.

—*Kirk* v. *Hamilton*, 102 U. S. 68, 26 L. ed. 79.

—*Ketchum* v. *Duncan*, 96 U. S. 659, 24 L. ed. 868.

IV.

The secretary of the Interior can only exercise such power as is specifically delegated to him by federal laws in relation of Indian lands, and he has no power to originate contracts, having only the power of approval or veto. and the approval by the Secretary of the Interior of an oil and gas lease does not cure any fatal defect in such instrument required by federal laws or state laws made applicable by Congress.

IN *Jennings* v. *Wood*, 192 Fed. 507, 112 C. C. A. 657, involving validity of an oil and gas lease by a restricted Indian, a member of the Five Civilized Tribes in Oklahoma, a minor 15 years old, and approved by the Secretary, the Court properly held the lease void, a prescribed legal pre-requisite wanting and said:

> "An approval which proceeds upon a consideration of the terms of the instrument offered and whether they are *reasonably for the interests of the Indian* was intended as an additional safe-guard for his protection. It would not, however, reach back and supply or confirm all the essential legal pre-requisites of a valid contract. It was no more a conclusive determination that the lessor, though a minor, was an adult, than that he was sound mentally or that he belonged to the classes of

Indians whose lands was of the character covered by the Statute. * * *"

"The jurisdiction of the Secretary of the Interior is only that expressed in the Acts of Congress. * * * Power was not conferred upon him to originate and make leases of allotted lands. * * * On the contrary his connection with the transaction and his authority, arose after the minds of the contractors came together, and *they must have been competent* to make the contract submitted for approval."

"* * *. The instrument went to the Secretary of the Interior as a lease completely executed and he could act on that presumption. He might properly make preliminary inquiry for his further assurance and he doubtless would decline to approve if advised of fatal defects, but he was not required to investigate and decide judicially matters lying back of and not appearing upon the face of the instrument. If he did his decision would not be conclusive."

Crosbie v. *Brewer*, 158 Pac. 388 (Okla.) quoting with approval *Jennings* v. *Wood*, *supra*.

Dickson v. *Luck Land Co.* 242 U. S. 371, 375 is a case wherein a member of the Chippewa Tribe of Indians made two deeds to his tribal allotment, the first before he was of age and the last after, the deeds being made to different parties. The question in the case was which of the two deeds should prevail. The holder of the first deed con-

tended that because the Act of Cong. March 1, 1907 (34 Stat. L. 1015, Chap. 2285) "made the majority of the allottee a condition prerequisite to patent being issued to him", and that because patent had been issued, that therefore he must be presumed to have been of full legal age at the time of the execution of the first deed, which was after issuance of the patent. Just as in the case at bar, it is contended by petitioners that because the Interior Department in its administrative capacity as guardian of Webster Chisholm, had approved the extension lease of March 9, 1914, it must be presumed that all conditions prerequisite to a valid lease had been complied with prior to the Interior Department's approval. But, this Court, in the Chippewa Indian case said that though the Act of Congress had provided that patent should not issue until the majority of the allottee was reached, and that though patent had issued, yet a purchaser from the allottee was not protected in presuming the majority of the allottee by the issuance of patent. In the body of the opinion of the Chippewa Indian case, this Court says:

> "Thus the question for decision is whether the patent was to be taken as determining the allottee's age for any purpose other than that of fixing his right to receive the full title, freed from all the restrictions imposed by Congress."

> "We conclude, therefore, that the *administrative finding* which this patent imports was not to be taken as decisive of the allottee's age for any purpose other than that of fixing his right to receive the full title, freed from all the restrictions upon its disposal which Congress had imposed."

The Chippewa Indian case, last quoted from, affords full authority for the Circuit Court of Appeal's decision in the case of *Jennings* v. *Wood*, *supra*.

The trial Court in instant case found (R. 21):

> "Neither in the original lease is any provision, either expressly or impliedly, contained stipulating for an extension or renewal of said lease on the part of said lessor, nor is such authority provided for in any rules and regulations on the part of the Secretary of the Interior then in force."

Sec. 2, Act of Congress, appd. May 27, 1908, (35 Stat. L. 312), provides:

> "That leases of restricted lands for oil, gas and other minerals, * * * may be made, with the approval of the Secretary, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

We do not understand that any Act of Congress, or any rule and regulation made pursuant to any such Act makes it the duty of the Interior Department to act as *quasi* guardian of the lessee

as well as the restricted Indian lessor; on the contrary we take it that the lessee himself must see to it that an otherwise valid contract is submitted to the Secretary for approval,—yet much of petitioners' brief seems to proceed upon the theory that:—

> "Well,—the Secretary of the Interior has approved our lease, why need we worry?"

The answer is given by the Circuit Court of Appeals in *Jenning* v. *Wood*, *supra*, which is:

> "An approval which proceeds upon a consideration of the terms of the instrument offered and whether they are reasonably for the interests of the Indian was intended as additional safeguard for his protection. It would not, however, reach back and supply or confirm all the essential, legal pre-requisites of a valid contract."

The *approval* of the lease in the case at bar, like that just quoted from, "proceeded upon a consideration of the terms of the instrument offered and whether they were reasonably for the interests of the Indian," and the approval in the case at bar no more "reached back and supplied or confirmed all the essential, legal prerequisites of a valid contract" than did the approval in *Jennings* v. *Wood*, *supra*.

And again we say that the Circuit Court of Appeals is abundantly supported in its *Jenning* v.

Wood, supra, holding, by this Court in its decision in *Dickson* v. *Luck Land Co., supra.*

Petitioners in their brief (pp. 36-7) put much store by this Court's opinion in *Blansett* v. *Cardin*, 256 U. S. 319, 65 L. ed. 950, 41 Sup. Ct. 519. The case holds that "the prohibition of Oklahoma Code (Sec. 8341) against the bequest by a married man or woman of more than two-thirds of his or her property away from the other spouse, cannot be invoked to defeat the will of an Indian married woman, the allottee of restricted lands, who died before the expiration of the trust or restrictive period," etc. The decision, however, is concerning lands of a Quapaw Indian allottee, and the law governing was the Act of Congress approved February 14, 1913, (37 Stat. 1. 678, chap. 55 Comp. Stat. Sec. 4228, 3 Fed. ann. 855) and the last proviso of Sec. 2 of the Act specifically excludes the Five Civilized Tribes and Osage Indians from operation of the Act. However, we are free to confess that were an allotment of the Five Civilized Tribes restricted from sale before this Court on the question of whether the allottee could will more than two-thirds of his restricted land away from the spouse that the decision might and well could be the same as in the Blansett case, for Sec. 23 of the Act of Congress approved April 26, 1906 (34 Stat. 127) provides:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all his estate, real and personal, and all interest therein; provided, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged beforehand approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

Sec. 8, Act of Cong. approved May 27, 1908, amends the last quoted section by adding thereto the words "or a Judge of a County Court of the State of Oklahoma." Thus we have an Act of Congress saying in so many words, though in negative form, that a full-blood Indian may disinherit the spouse by will approved by the agencies designated. This is in direct conflict with the Oklahoma Statute, and the latter must give way. Webster Chisholm, allottee in the case at bar, being a half-blood only could not by will deprive his wife of her one-third interest in even the restricted fifty acres of his allotment.

There is no proof or admission in the record in the instant case to support the contention of petitioners (pp. 16-17 of their brief) that the Interior Department has "for a long period of time" ignored the provisions of the Enabling Act adopting and putting in force the Oklahoma laws requir-

ing that any instrument affecting the homestead of the family shall be joined in by both husband and wife. The argument of petitioners (p. 15 of their brief) that millions of acres of land have been leased for oil and gas, and "a large number of these leases will fall or stand with the decision of the court in this case" is not supported by the record, and for all respondents know the Secretary has so recognized the homestead laws of the state, and this case presents the only exception.

In the instant case there is no Act of Congress providing that a restricted Indian allottee may sell or lease his allotment constituting the family home and therefore impressed with the homestead character without taking the spouse into the same partnership, fellowship and consultation to such transaction as though the allottee were not restricted. And, the only reason that we are able to gather from petitioners' brief why such holding should be, as by them contended, is—

> "* * * it would place in the hands of the spouse the power to thwart the will and desire of an allottee and the Secretary of the Interior.
>
> "Assuming that a restricted Indian owned an allotment adjacent to valuable oil property and desired to lease the same for a large sum of money, and the consideration was acceptable to the Secretary of the Interior, but a non-citizen spouse for some reason would not

join in the execution of the lease, is it a reasonable construction of the Acts of Congress, taken in connection with the history and policy of the government, toward its Indian wards, that such spouse would possess this veto power instead of the Secretary of the Interior * * *" (p. 33 petitioners' brief).

Maybe so,—but the Holy Bible says something bout—"Whom God hath joined together, let no man put asunder." Better that the "will and desire of the allottee and the Secretary of the Interior" be thwarted than that the seed of discord nd discontent be sown in the Indian home. Better hat, than that the spouse (a citizen or non-citizen) e made to feel that she is not in the same kind of spouse as those about her.

The marriage relation and the home are such cred institutions that we prefer to let them reain under that halo of glory pronounced thereon this Court in *Fink, U. S. Marshal*, v. *O'Neil*, 106 S. 275, 27 L. ed. 196, where this Court, after layg the foundation, says:

> "By parity of reasoning, based on the declared public policy of the States, where the people are the sovereign, laws which are acts of preservation of the home of the family, exclude supposition of any adverse public interest, because none can be thought hostile to that * * * for civilization has no promise that is not nourished in the bosom of the secure and well ordered household."

In Conclusion

By virtue of the adoption of the homestead and exemption laws by the Federal Government in the Oklahoma Enabling Act, *supra*, and by local enactment by the inhabitants of the State of Oklahoma, effect should be given to both Federal and such local laws for the protection of this Indian home, and respondents urge that the decision of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

J. Howard Langley,
Harve N. Langley,
S. R. Lewis,
O. S. Booth,

Solicitors for Respondents.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

SPERRY OIL & GAS COMPANY AND OKLAHOMA PRODUCING & REFINING CORPORATION OF AMERICA, appellants and petitioners,
v.
PEARL CHISHOLM AND WEBSTER CHISHOLM.
No. 164.

APPEAL FROM AND CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

Comes now the Solicitor General and, leave of the court being first had, submits this brief on behalf of the United States because of its interest as guardian of the Indians in the subject matter thereof, which involves the power and duty of the Secretary of the Interior with respect to a matter relating to Indian property.

STATEMENT.

This suit concerns rights asserted by the Sperry Oil & Gas Company and the Oklahoma Producing & Refining Corporation in a tract of 80 acres of land allotted to Webster Chisholm, a half-blood Cherokee Indian.

72126—23——1

In 1904 Chisholm, then unmarried, executed a 15-year oil and gas lease to the Creek & Indiana Development Company (R. 39–42) covering this land which constituted his homestead and surplus allotments, both of which were then restricted.

This lease was approved by the Secretary of the Interior (R. 44)—a requisite to its validity under § 2 of the Act of May 27, 1908, c. 199, 35 Stat. 312, which provides that—

> leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise.

The provisions of that section were substantially a reenactment of § 72 of the Original Cherokee Agreement Act of July 1, 1902, c. 1375, 32 Stat. 716, 726, which provided for the allotment in severalty of the tribal lands of the Cherokees.

The Act of May 27, 1908, removed the restrictions from this *surplus* allotment but continued them as to the *homestead*. Chisholm married in 1911 and shortly thereafter he and his wife took up their residence upon the leased land. In 1914 Chisholm executed an instrument extending the lease in force as long as oil or gas was produced in paying quantities (R. 45, 46). This was approved by the Secretary of the Interior as to the homestead allotment only (R. 45). Thereafter the Sperry Oil & Gas Company took an assignment of the lease and later assigned to the

Oklahoma Producing & Refining Corporation. Both these assignments were approved by the Secretary of the Interior as to the land covered by the homestead allotment.

In August 1919, a few months after the expiration of the 15-year period for which the original lease was made, Chisholm and his wife instituted this suit to set aside the instrument extending the lease on the theory that by reason of their occupancy of the land it became a homestead under the state law, and as the wife did not join in the execution of this supplemental lease it was null and void under §1143, Rev. Laws Oklahoma. That section provides:

> * * * No deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced or legally separated, except to the extent hereinafter provided.

The ultimate question thus presented is whether the Secretary of the Interior, in supervising the leasing of restricted lands of Cherokee allottees, must conform to and be governed by the laws of the state of Oklahoma. The District Court and the Circuit Court of Appeals both held that the federal law should be construed so as to give force to it and the state law. Therefore it was ruled that a lease to be valid, even though approved by the Secretary of the Interior and consistent with rules laid down by

him governing leases, must be one which would be valid under the state law. Op. District Court, R. 20–25, 273 Fed. 589; C. C. A., R. 108, 282 Fed. 93. This we contend was erroneous, particularly in so far as it affected the land embraced in the restricted homestead allotment. It is also contrary to the uniform holding of the Interior Department maintained for about twenty years.

It should be noted that the claim made by appellees is that the Secretary's supervision of the lease operations ceased after the expiration of the 15-year period fixed by the original lease of 1904. There is no claim that he did not have supervision up to that time of such operations on the homestead and the surplus allotments, for both were restricted when the original lease was executed. (R. 37.)

ARGUMENT.

I.

The power of Congress over restricted Indian land is plenary, and its legislation can not be limited by state legislation.

There is a wide distinction between the homestead designated under the federal law and that referred to in the Oklahoma statutes.

Section 13 of the Cherokee Agreement provides that each allottee at the time of his selection of lands to be allotted to him shall designate as a homestead out of such lands a tract equal in value to 40 acres of average allotted land. There was no specific requirement that he should live on this land, but

the prime distinction between the homestead and the balance of the land allotted (surplus) was in the more stringent restriction placed upon the former.

The homestead of Chisholm was restricted under the terms of §1 of the Act of May 27, 1908, *supra*, since it was his homestead allotment and he was a half-blood Cherokee. There was full power in Congress to legislate with respect to this property, for it had a governmental interest therein as guardian of the Indians and also a duty under the Cherokee Agreement. This power with respect to Indians is plenary. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 310, 311; *Hallowell* v. *Commons*, 239 U. S. 506, 509. It continues after the Indians have been made citizens, and may be exercised as to restrictions upon alienation. *Bowling* v. *United States*, 233 U. S. 528; *Williams* v. *Johnson*, 239 U. S. 414, 420. The policy of the United States is not a matter that the states can regard or disregard at their will. *Sage* v. *Hampe*, 235 U. S. 99, 106.

No law of Oklahoma could confer upon Chisholm power to lease this restricted land, and, conversely, no such law could impair the power given to the Secretary by the federal law. *United States* v. *Holliday*, 3 Wall. 407, 419; *United States* v. *Sandoval*, 231 U. S. 28, 47; *Bunch* v. *Cole and Matthews*, decided Nov. 19, 1923. The federal law alone could prescribe how and under what conditions the restrictions could be removed, and state legislation had no application. Compare *McCune* v. *Essig*, 199 U. S. 382; *Wadkins* v. *Producers Oil Co.*, 227 U. S. 368.

It is only after the restrictions are removed that the state law becomes applicable. *Dickson* v. *Luck Land Co.*, 242 U. S. 371, 375. Even then it can not operate retroactively to make valid what was void under the federal law. *Monson* v. *Simonson*, 231 U. S. 341, 347; *Franklin* v. *Lynch*, 233 U. S. 269.

The leasing of the homestead did not remove restrictions. *Parker* v. *Richard*, 250 U. S. 235, 239.

In *La Motte* v. *United States*, 254 U. S. 570, this court said of the function of the Secretary of the Interior in approving a lease and of his regulations under the law there considered (pp. 575, 576):

> It is insistently urged that the regulations adopted and promulgated by the Secretary of the Interior are void and of no effect, and therefore that no right to relief can be predicated upon the defendants' disregard of them. The argument advanced is that the leasing provision says nothing about regulations; that the clause "subject *only* to the approval of the Secretary of the Interior" makes strongly against any regulations; that what is intended is to leave the Indian free to lease in his own way and on his own terms, subject to the Secretary's approval or disapproval of the lease after it is given; and that the regulations, as adopted and promulgated, unwarrantably interfere with this freedom of action. In our opinion the insistence is not tenable. * * *
>
> The leases are subjected to the Secretary's approval or disapproval to the end that the allottees and their heirs may be protected

> from their own improvidence and from overreaching by others. Both the lands and the Indians are remote from the seat of government, and without some general and authoritative rules for the guidance of intending lessors and lessees it is certain that improvident and ill-advised leases would be given and multiplied in a way which would confuse and embarrass the Indians and greatly enhance the difficulties attending the Secretary's supervision.

And at p. 577:

> Without doubt the regulations prescribed operate to restrain the Indian from leasing in his own way and on his own terms, but this is not a valid objection. If there were no regulations, the disapproval of a lease satisfactory to him would work a like restraint. Manifestly some restraint is intended, for the leasing provision does not permit the Indian to lease as he pleases, but only with the Secretary's approval.

What was there said is at least of equal force in this case, for the language of the statute is stronger, since the leases are authorized to "be made with the approval of the Secretary of the Interior under rules and regulations provided by the Secretary of the Interior, and not otherwise."

To compel the Secretary to conform to the requirements of the state law would be to subordinate his action under federal authority to that of the state, and would result in a curtailment and infringement of the superior federal power by the inferior state

power. In the present case it would mean that a lease which has been entered into conformably with the regulations of the Secretary, and which had received his approval, could be declared void by invoking the state statute. This could not be tolerated, for it would place the federal power at the mercy of the state. *Camfield* v. *United States*, 167 U. S. 518; *Light* v. *United States*, 220 U. S. 523. The state laws have no application or force save as they have been adopted or made applicable by Congress. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404, 405.

We consider *Blanset* v. *Cardin*, 256 U. S. 319, absolutely controlling in this case. There a statute of the United States authorized Indians to dispose of restricted property by will, subject to the approval of the Secretary of the Interior under regulations to be prescribed by him. A will was made and approved whereby all the restricted property of an Indian was devised to others than her husband. He assailed the will as invalid and void because a statute of Oklahoma provided that no woman while married should bequeath more than two-thirds of her property from her husband.

This court upheld the will, saying (p. 324):

> The Secretary of the Interior made regulations which were proper to the exercise of the power conferred upon him and the execution of the act of Congress, and it would seem that no comment is necessary to show that §8341 [the State statute] is excluded from pertinence or operation.

And (p. 326):

> In a word, the act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under an Oklahoma Code.

The court approved the language of the Circuit Court of Appeals to the effect that the intention of Congress was that the Indians should have the right to dispose of property by will "free from restrictions on the part of the State as to the portions to be conveyed or as to the objects of the testator's bounty."

If, as held in that case, it was not necessary that a *will* affecting restricted property conform to state law, or that it be a will valid under state law, then it is logically inevitable that a *lease* need not conform to, or be such as would be valid under, such law. The power of Congress and the authority of the Secretary in the one case is not greater than in the other.

The Circuit Court of Appeals said that the instant case was distinguishable from *Blanset* v. *Cardin* but we submit that the distinction is not pointed out in any satisfactory way.

72126—23—2

II.

The departmental construction of, and the rules and regulations under, the law have proceeded upon the theory that the state legislation is inoperative.

The first leases of restricted Cherokee lands were executed under authority of the Cherokee Agreement Act of July 1, 1902, *supra*. The first regulations were promulgated in 1904. During subsequent years the Secretary of the Interior has uniformly given the law the construction here contended for, and has not recognized the state laws as of controlling or limiting force, nor considered an allottee's spouse a necessary party as lessor. Leases have been accepted and operations carried on at great expenditure of time, labor, and money upon that construction of the law. The lessees have assumed obligations in reliance thereon. It has become a rule of property. To overturn it would result in great prejudice to these lessees and an incalculable confusion in the administration of leasing of lands of allottees of the Five Civilized Tribes.

The case in this phase comes well within the rule that the practical construction given to an Act of Congress by those charged with the duty of enforcing it is entitled to great respect, and if acted upon for a number of years will not be disturbed except for cogent reasons. *LaRoque* v. *United States*, 239 U. S. 62, 64; *McLaren* v. *Fleischer*, 256 U. S. 477, 481.

"Those who have relied thereon ought not lightly to be put in peril." *Harris* v. *Bell*, 254 U. S. 103, 109.

Inasmuch then as the power of Congress was plenary and complete, dominating the entire field of operation with respect to the restricted land, its alienation and leasing, and as the Secretary of the Interior was made the agent of the Government in executing the policy of Congress declared in the Act of May 27, 1908, it is not too much to assert that he alone was competent to determine the manner, form and conditions under which the leases should be made. His regulations, promulgated under the express authority of the statute, being consistent with it, not arbitrary, unreasonable or inappropriate, must be deemed valid. *United States* v. *Morehead*, 243 U. S. 607; *La Motte* v. *United States*, *supra*.

The Circuit Court of Appeals appears to have proceeded upon the theory that the statute authorizing leases must have contemplated a lease valid under that law. Nothing in the statute reveals or evidences such an intention. The same contention was pressed in *Blanset* v. *Cardin*, *supra*, but was rejected. It can not be disputed that the Oklahoma statute, if applicable to a lease of restricted Indian land, would constitute a limitation upon the power of the Secretary and hence one upon the power of Congress.

The Circuit Court of Appeals placed reliance upon the Constitution of Oklahoma (Art. 12, §1) which, defining a homestead, declared—

> That nothing in the laws of the United States, or any treaties with the Indian Tribes

> in the State, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the State.

We fail to see wherein this provision has any application. It certainly does not apply to Pearl Chisholm, the wife, for, so far as the record discloses, she is not an allottee, and the land involved is not her allotment. Hence, she does not come under the purview of the phrase "Indian or other allottee."

While Webster Chisholm is within the letter of it, being an Indian allottee, yet with respect to his homestead the provision was unnecessary since that land was restricted and hence needed not the protection thus afforded. Clearly the provision relates only to lands held by allottees and which were not restricted.

The fact that the Oklahoma Enabling Act (34 Stat. 267) declared in §21 that all laws in force in the Territory at the time of its admission into the Union should be in force throughout the state does not have any weight here. That provision had reference to matters within the state's legislative power and did not relate to subjects which were within the regulating power of Congress. *Truskett* v. *Closser*, 236 U. S. 223, 228.

In passing the Enabling Act Congress preserved the authority of the Government of the United States over the Indians, their lands and property, which it had prior to the passage of that Act. *Tiger* v. *Western Investment Co., supra.* This legislation did not derive its force from any compact with the state nor by reason of its acceptance by the state as a term of

admission, but solely because the power of Congress extended to the subject. *Coyle* v. *Oklahoma*, 221 U. S. 559, 574; *Ex parte Webb*, 225 U. S. 663.

There is no substantial basis for an assertion that Congress, in providing for leases in the Act of May 27, 1908, legislated in the light of the existing laws of Oklahoma, and hence must have contemplated the leases authorized would conform to the state law.

The provision relative to leases is a substantial reenactment of that contained in the Cherokee Agreement of 1902, *supra*, which was operative long prior to the admission of Oklahoma. No intention to make any change in the method of leasing is apparent in the Act. The paramount object and purpose of the 1908 Act was, by removing restrictions, to make a large part of the allotted lands of the Five Civilized Tribes subject to taxation for the support of the state government. House Report 1454; Senate Report 575, 60th Cong., 1st sess.

Furthermore, if Congress had intended to make the laws of Oklahoma controlling with respect to the form and manner in which leases of restricted lands should be executed, it could easily have so declared; a purpose to do that would doubtless be plainly expressed (*Parker* v. *Richard*, 250 U. S. 235, 240), particularly in view of the numerous enactments of Congress respecting Indians and their property, wherein it has provided that under certain conditions they shall be governed by the state laws. An instance of this is found in § 9 of this Act of May 27, 1908, wherein it is declared that the laws of

descent and distribution of the state of Oklahoma shall be applicable to property of allottees dying intestate. *Jefferson* v. *Fink*, 247 U. S. 288, 293. Another instance appears in the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, which in § 5 provides that the patent issued to an allottee should declare that the United States would hold the land in trust for the benefit of the Indian, or, in case of his decease, of his heirs *according to the laws of the State or Territory* where the land was situated. Also the statutes relating to descent and distribution of Creek Indian property. *Washington* v. *Miller*, 235 U. S. 422.

III.

The continued supervision by the Secretary of the collection of royalties arising from operations on the unrestricted surplus allotment was warranted as a necessary incident to the proper protection of the interest of the Government's ward, the allottee.

When the Act of May 27, 1908, became operative this was the situation confronting the Secretary of the Interior—many leases were outstanding, each of which covered both homestead and surplus allotments. Operations under these leases had been carried on treating the entire leasehold as a unit. Theretofore all the land covered by the leasehold had been restricted. Now the restrictions were removed as to a part. Leases were being, and would be thereafter, presented for approval affecting both restricted and unrestricted lands, and the intention of the lessee in each case was to operate both tracts as a unit, which they were physically.

Obviously, if the lands were operated as a unit, it would be difficult for the Secretary to ascertain with accuracy the exact amount of production from the restricted portion of the lease, and hence it would be impossible for him to be assured that the allottee was receiving his full royalty from that portion. The result would be that the Secretary could not properly discharge the duty imposed upon him by Congress to supervise the restricted allotment.

To meet this situation, paragraph 42 *d* was incorporated into the regulations governing leases (R. 69). It is as follows:

> In event restrictions are removed from a part of the land included in a lease for oil, gas, or other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior, and all royalties thereunder shall be paid to the Indian agent until such time as the lessor and lessee shall furnish the Secretary of the Interior satisfactory information that adequate arrangements have been made to account for the oil, gas, or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulations provided.

It will be observed that so far as the unrestricted portion of a leasehold is concerned, the Secretary

assumes no authority to supervise, regulate or dictate as to its alienation or incumbrance or use. The regulation goes only to the method of accounting for the royalties due under the entire lease. This was necessary to safeguard the interest of the allottee, who is still a ward of the government. It does not prejudice his rights, for the royalty is all to be paid over to him ultimately, and therefore the result is the same as it would be were the proceeds from the unrestricted land paid to him directly by the lessee. Indeed, we can conceive of instances where the supervision of the Secretary would be of decided benefit. So far as his wife is concerned, she is in no different situation than if she had consented to the lease, for in no event would royalties be paid to her.

This regulation has been in effect for more than fifteen years. It has never before been questioned but has long been acquiesced in. Operations have been conducted and payments made agreeably to it. It therefore should not be set aside unless it clearly appears that it is without the slightest justification. If declared void, the result would be great confusion and serious embarrassment to the Interior Department in the administration of lease matters.

There is another consideration. The lease as originally made contained this provision (R. 41):

> And the party of the second part agrees that this indenture of lease shall in all respects be subject to the rules and regulations hereto-

> fore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation.

An amendment to the 1908 regulations, which was promulgated May 1, 1911, provides (R. 52):

> Appropriate changes will be made in the lease form to provide for and carry into effect the provisions of the above modified regulations and such modifications of the regulations and lease form shall be effective May 1, 1911, and may, at the option of the parties, be incorporated in leases hereafter executed prior to that date. Said modified provisions may also be substituted in any lease, executed prior to said date on forms now or heretofore in use, in lieu of corresponding provisions contained in such leases, upon formal stipulations by the parties to that effect, when duly approved by the Secretary of the Interior. All leases which embrace the said provisions, whether in original form or by substitution, shall be subject to these regulations.

The instrument executed by Chisholm in 1914 stipulated for the substitution of the lease form of 1908 for the form originally executed in 1904. This 1908 form provided that the duration of the lease should be as long as oil and gas was found in paying quantities (R. 47).

Inasmuch as the original lease was made subject to regulations which might thereafter be adopted, and as the subsequently adopted regulations au-

thorized the substitution of the 1908 form of lease, it might well be argued, granting that the allottee's wife did acquire an interest in the unrestricted land, that such interest was acquired subject to the terms of the lease and any modifications which might be made consistent with the Secretary's regulations. In this connection, it is important to note that the regulations quoted were existing when Webster and Pearl were married October 11, 1911, prior to which, in any event, she had no right or interest in any part of the land.

CONCLUSION.

The judgment of the Circuit Court of Appeals was erroneous and should be reversed.

November, 1923.

JAMES M. BECK,
Solicitor General.
H. L. UNDERWOOD,
Special Assistant to the Attorney General.

○

SPERRY OIL & GAS COMPANY ET AL. *v.* CHISHOLM ET AL.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 164. Argued January 16, 1924.—Decided April 7, 1924.

1. A final decree of the Circuit Court of Appeals in a suit removed to the District Court upon the ground that it arose under the laws of the United States, *held* reviewable here by appeal and not by certiorari. P. 490.
2. Under the constitution and statutes of Oklahoma, the family homestead of an Indian may include his tribal "homestead" allotment as well as his tribal "surplus" allotment; and a lease, invalid because executed by the husband alone, may be set aside in a suit brought by the husband and wife, unless she is estopped by her acts and conduct from asserting its invalidity. P. 492.
3. The power of Congress to deal with the Indians in Oklahoma as a dependent people and legislate concerning their property with a view to their protection, was reserved by the Oklahoma Enabling Act, the terms of which were accepted by an ordinance of the constitutional convention of Oklahoma later ratified with the constitution of the State. P. 493.
4. The authority given by the Act of Congress of May 27, 1908, to a Cherokee Indian of the half-blood to make an oil and gas lease upon his restricted "homestead" allotment, with the approval of the Secretary of the Interior, cannot be limited or contravened by the provision of the Oklahoma law attaching to the execution of a lease upon the family homestead the condition that it must be also executed by his wife. P. 494.
5. The provision of the Oklahoma Enabling Act that all laws in force in Oklahoma Territory at the time of the admission of the State should be in force throughout the State, "except as modified or changed by this Act or by the constitution of the State", related only to laws affecting the citizens of the State generally, and did not authorize the application of such laws in contravention of acts passed by Congress in reference to the property of Indians under the power expressly reserved in the Enabling Act itself. P. 496.
6. The provision in the Oklahoma constitution that nothing in the laws of the United States shall deprive any Indian or other allottee

of the benefit of the homestead laws of the State cannot give validity to laws of the State repugnant to the reserved powers of the United States in legislating in respect of the lands of Indians. P. 497.

7. The "surplus" allotment of a half-blood Cherokee, upon being freed from all federal restrictions by the Act of May 27, 1908, *supra*, became subject to the laws of Oklahoma like property of other citizens, including the law (*supra*, par. 2) restricting the disposition of family homesteads. P. 497.
8. Regulations of the Secretary of the Interior providing that if restrictions were removed from part of the land included in an oil and gas lease, the entire lease should continue subject to approval and supervision and all royalties thereunder be paid to the Indian agent until lessor and lessee arranged for separate accountings upon the restricted and unrestricted land, *held* not to relieve a lease, as to the unrestricted land included, from invalidity under the Oklahoma family homestead law. P. 498.
9. Where an oil and gas lease of land is found invalid under the family homestead law, the court cannot permit the lessees to continue extracting oil and gas upon the condition that they do not interfere with the owners' use of the surface as a homestead. P. 498.

282 Fed. 93, affirmed in part and reversed in part; certiorari dismissed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court, which canceled a lease made by an Indian of his homestead and surplus allotments,—together constituting his family homestead,—upon the ground that, not being executed by his wife, the instrument was invalid under the Oklahoma family homestead law. Certiorari also was granted.

Mr. Preston C. West, with whom *Mr. Alvin Richards* and *Mr. A. A. Davidson* were on the brief, for appellants and petitioners.

Mr. H. L. Underwood, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States, by special leave of Court, as *amici curiae*.

Mr. J. Howard Langley, with whom *Mr. Harve N. Langley, Mr. S. R. Lewis* and *Mr. O. S. Booth* were on the brief, for appellees and respondents.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The appellees, Webster Chisholm, a half-blood Cherokee Indian, and his wife, brought this suit in a state court of Oklahoma to cancel a supplemental instrument modifying and extending an oil and gas lease previously executed by him upon his "homestead" and "surplus" allotments of tribal lands. It was removed to the Federal District Court. That court, upon final hearing, entered a decree adjudging this instrument to be entirely null and void, and enjoining interference with the plaintiffs' possession of the premises.[1] This decree was affirmed by the Circuit Court of Appeals. 282 Fed. 93. An appeal to this Court was allowed by a Circuit Judge; and thereafter the appellants were also granted a writ of certiorari. 261 U. S. 611.

As the suit was removed to the federal court upon the ground that it arose under the laws of the United States,[2] the decree of the Circuit Court of Appeals was not made final by the provisions of § 128 of the Judicial Code and § 3 of the Act of September 6, 1916, c. 448, 39 Stat. 726. *Southern Pacific Co.* v. *Stewart,* 245 U. S. 562. Therefore the appeal was properly allowed under § 241 of the Judicial Code; and the writ of certiorari must be dismissed.

Chisholm is an enrolled citizen of the Cherokee Nation, of the half-blood. Pursuant to the Cherokee Agreement—embodied in the Act of July 1, 1902, c. 1375, 32

[1] See *Chisholm* v. *Creek & Indiana Development Co.* (D. C.) 273 Fed. 589, the opinion on interlocutory hearing. The Development Co., although named as a defendant in the original petition, was not served with process and did not enter its appearance, and the case was heard only as to the other two defendants, the appellants here.

[2] See *McCune* v. *Essig,* 199 U. S. 382.

Stat. 716—he was allotted two tracts of tribal lands: one of thirty acres designated as a "homestead"; and another adjoining tract of fifty acres designated as "surplus". The alienation of both of these tracts was then restricted. In 1904, while unmarried, he executed an oil and gas lease for a term of fifteen years to the Creek & Indiana Development Co., covering, as an entirety, the eighty acres of his two allotments. It contained no provision for an extension or renewal. This lease was approved by the Secretary of the Interior. Chisholm married in 1911. In 1912, he and his wife moved upon the leased land, and have since that time occupied and claimed the entire eighty acres as a family homestead. Their residence is upon the "homestead" thirty acres, the cultivated land and pasture extending upon the "surplus" fifty acres. Neither owns any other land. In 1914—more than five years before the expiration of the lease—the lessee having found oil in paying quantities and completed the drilling of five wells, Chisholm executed a written instrument modifying the terms of the lease, in accordance with regulations prescribed by the Secretary of the Interior, so as to provide for an increased royalty and extend the lease as long as oil or gas should be found in paying quantities. This instrument—hereinafter called the extension lease—was approved by the Secretary of the Interior as to the "homestead" thirty acres, which was still restricted land; but was neither approved nor disapproved by him as to the "surplus" fifty acres, from which the restrictions had previously been removed. It was not, however, executed or joined in by his wife. Later in the same year the Development Company assigned the lease to the Sperry Oil & Gas Co.; and that Company in 1918 assigned it to the Oklahoma Producing & Refining Corporation. The suit was commenced in 1919, about three months after the expiration of the term of the original lease. The lessees had then driven eleven wells on the leased premises

and removed a large amount of oil. All royalty due under the leases at the original and increased rates had been paid by the lessees to Chisholm, or to the Indian agent for his benefit, and had been received by Chisholm; and such payments were continued to the time of the trial. His wife, however, received no part of this royalty, and did not learn that he had extended the original lease until shortly before the commencement of the suit.

1. The ground of decision in both the lower courts was that the extension lease executed by Chisholm was void under the provisions of the constitution and laws of Oklahoma relating to family homesteads because it was not joined in or consented to by his wife. The constitution of Oklahoma provides that the rural homestead of any family in the State "shall consist of not more than one hundred and sixty acres of land, . . . in one or more parcels, to be selected by the owner;" and that "nothing in the laws of the United States . . . shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the State." Art. 12, § 1. These provisions are also contained in the state statutes. 1 Rev. Laws, 1910, § 3343, p. 834. The family homestead of an Indian under the state law may include his tribal "homestead" allotment as well as his tribal "surplus" allotment. *Hyde* v. *Ishmael*, 42 Okla. 279; *Norton* v. *Kelley*, 57 Okla. 222; *Belt* v. *Bush* (Okla.), 176 Pac. 935. It is further provided by a statute originating in the territorial session laws of 1901, c. 10, p. 78, that "no deed, mortgage or contract relating to the homestead", except a lease for not exceeding one year, "shall be valid unless in writing and subscribed by both husband and wife." 1 Rev. Laws, 1910, § 1143, p. 292. This applies to oil and gas leases covering the homestead. *Carter Oil Co.* v. *Popp* (Okla.), 174 Pac. 747; *Rich* v. *Doneghey* (Okla.), 177 Pac. 86; *Treese* v. *Shoemaker*, 80 Okla. 235. And, the interest of the husband and wife in

the homestead not being severable, a lease or other contract relating to the homestead executed by the husband alone, may be set aside in an action brought by the husband and wife, unless she is estopped by her acts and conduct from asserting its invalidity. *Hall* v. *Powell*, 8 Okla. 276; *Kelly* v. *Mosby*, 34 Okla. 218; *Brusha* v. *Board of Education*, 41 Okla. 595; *Hyde* v. *Ishmael, supra; Carter Oil Co.* v. *Popp, supra.*

2. In our opinion, however, these provisions of the constitution and laws of Oklahoma have no application to so much of the extension lease as covers the tribal "homestead" of thirty acres.

By the Oklahoma Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267, it was provided that nothing in the constitution of the State should be construed to limit or affect the authority of the Government of the United States to make any law or regulations respecting the Indians of the Territory, their lands, property or other rights, which it would otherwise have been competent to make. (§ 1.) The terms and conditions of the Enabling Act were accepted by the Constitutional Convention of Oklahoma by an "irrevocable" ordinance, which was ratified with the constitution itself. *Coyle* v. *Oklahoma*, 221 U. S. 559, 564; *Jefferson* v. *Winkler*, 26 Okla. 653, 662; *Molone* v. *Wamsley*, 80 Okla. 181, 182. Congress was thus careful to preserve to the United States the authority over the Indians, their lands and property, which it possessed prior to the passage of the Enabling Act: retaining full power, which it had exercised from the earliest period, to deal with them as a dependent people and legislate concerning their property with a view to their protection; with the right to determine when, in their interest, the Government guardianship should cease, and plenary authority, notwithstanding the bestowal of federal citizenship upon them, to place restrictions upon their right of alienating the lands allotted to them. *Tiger* v. *Western*

Investment Co., 221 U. S. 286, 309; *Heckman* v. *United States*, 224 U. S. 413, 416. And in all matters relating to the restrictions upon their allotted lands resort must be had to the acts of Congress and to those acts alone. *Walker* v. *Brown*, 43 Okla. 144; *Collins Inv. Co.* v. *Beard*, 46 Okla. 310; *Wilson* v. *Greer*, 50 Okla. 387; *Smith* v. *Williams*, 78 Okla. 297; *Molone* v. *Wamsley*, *supra*.

By the Act of May 27, 1908, c. 199, 35 Stat. 312—which was in force when the extension lease was executed—it was provided that the "homesteads" allotted to members of the Five Civilized Tribes of the half-blood should not be subject to alienation or incumbrance prior to April 26, 1931, unless such restrictions were removed by the Secretary of the Interior; but all restrictions upon the alienation or incumbrance of their other allotted lands were removed. § 1. And it was further provided that "leases of restricted lands for oil, gas or other mining purposes . . . may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise". § 2. No other conditions were attached to the making of such leases.

The authority thus given by the act of Congress to an Indian of the half-blood to make an oil and gas lease upon his restricted "homestead" allotment, with the approval of the Secretary of the Interior, cannot be limited or contravened by the provision of the Oklahoma law attaching to the execution of a lease upon the family homestead the condition that it must also be executed by his wife. This added requirement is inconsistent with the authority given the allottee by the act of Congress to make such lease when approved by the Secretary of the Interior, and, if the wife does not consent to the lease, would entirely defeat the purpose of Congress. As applied to an oil and gas lease made by such an allottee upon his restricted "homestead", the provision of the Oklahoma

law is hence invalid because of its repugnancy to the paramount act of Congress. "The power of Congress to impose restrictions on the right of Indian wards of the United States to alien or lease lands allotted to them in the division of the lands of their tribe is beyond question; and of course it is not competent for a State to enact or give effect to a local statute which disregards those restrictions or thwarts their purpose." *Bunch* v. *Cole,* 263 U. S. 250, 252.

On the precise question of the effect of a state law which, if applicable, adds a condition to the exercise by an Indian allottee of rights granted him by an act of Congress, the decision in *Blanset* v. *Carden,* 256 U. S. 319, 324, 326, is controlling. There an act of Congress gave Indians the right to dispose of their restricted allotments by will, in accordance with the regulations prescribed by the Secretary of the Interior and subject to his approval. And it was held that a will made by an Indian woman, which was approved by the Secretary of the Interior, devising her restricted lands to others than her husband, was not invalidated by a provision of the Oklahoma code that no married woman should bequeath more than two-thirds of her property away from her husband. The Court said: "The Secretary of the Interior made regulations which were proper to the exercise of the power conferred upon him . . . and it would seem that no comment is necessary to show that [the provision of the Oklahoma Code] is excluded from pertinence or operation. . . . In a word, the act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma Code. . . . Our conclusion is . . . that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under

this act of Congress, free from restrictions on the part of the State as to the portions to be conveyed or as to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior."

So it was the intention of Congress that Indian allottees of the half-blood should have the right to make oil and gas leases upon their restricted "homestead" allotments, provided they are in accordance with the regulations of the Secretary of the Interior and are approved by him.

To the same effect are the decisions of the Supreme Court of Oklahoma. In *Walker* v. *Brown, supra,* at p. 146, the court, in holding that a restrictive provision of an Oklahoma statute was not intended to apply to the will of an Indian woman devising her "homestead" allotment under the authority given by the acts of Congress, said: "This court has repeatedly held that acts of Congress supplant the laws of Oklahoma in relation to Indians; that certain state laws which are applicable to every other citizen are not in force as against or pertaining to the Indians of the Five Civilized Tribes, and that we have here, respecting some matters, two classes of citizens and two legislative sovereignties. . . . It is obvious that, if the state law were given the construction contended for, it would have the effect of interfering with the policy of the Congress toward the Indians in the matter of the alienation of their allotted lands." This case was approved and followed in *Brock* v. *Keifer,* 59 Okla. 5, 8. And in *Molone* v. *Wamsley, supra,* at p. 183, it was said that it is "beyond the power of the Legislature to enact any law invalidating or affecting" conveyances by Indian heirs "made and approved in conformity with the acts of Congress." And see *Haddock* v. *Johnson,* 80 Okla. 250.

The Oklahoma statute derives no additional force as a restriction upon leases made by Indian allottees because it was in force as a territorial law at the time the Enabling

Act was passed, and that act provided that all laws in force in the Territory at the time of the admission of the State into the Union should be in force throughout the State "except as modified or changed by this act or by the constitution of the State." (§ 21.) Manifestly this provision related only to statutes affecting the citizens of the State generally and was not intended to authorize the application of such laws in contravention of the acts passed by Congress in reference to the property of Indians under the power expressly reserved in the Enabling Act itself. Nor can it have that effect. See *Truskett* v. *Closser,* 236 U. S. 223.

Nor is the validity of the extension lease affected by the provision in the Oklahoma constitution that nothing in the laws of the United States shall deprive any Indian or other allottee of the benefit of the homestead laws of the State. Whether or not this provision was intended to do more than to protect the allottees from the enforced seizure of their homesteads, it is sufficient to say that, whatever its purpose, it can have no more effect than the Oklahoma statute in giving validity to laws of the State repugnant to the reserved power of the United States in legislating in respect to the lands of Indians. Neither the constitution of a State nor any act of its legislature, whatever rights it may confer on Indians or withhold from them, can withdraw them from the operation of an act which Congress passes concerning them in the exercise of its paramount authority. *United States* v. *Holliday,* 3 Wall. 407, 419.

It results that the extension lease executed by Chisholm in 1914, which was made under the regulations of the Secretary of the Interior and was approved by him as to the "homestead" allotment of thirty acres, must be held to be valid as to such allotment.

3. As to the fifty acres of the "surplus" allotment, also included in the extension lease, an entirely different

question is presented. All restrictions upon this land had been removed by the Act of 1908. When the extension lease was executed there was no limitation under the acts of Congress upon Chisholm's right to alienate, encumber or lease this tract. It had become in all respects subject to his control, under the laws of the State, just as the property of other citizens. *Jefferson* v. *Winkler*, 26 Okla. 653, 664. All questions pertaining to its disposal fell under the scope and operation of those laws. *Dickson* v. *Luck Land Co.*, 242 U. S. 371, 375. And since his wife did not join in the execution of the extension lease, and there is nothing in her acts and conduct which estops her from asserting its invalidity, under the provisions of the Oklahoma statute, as interpreted and applied by the courts of the State, it must be held to be invalid as to the "surplus" allotment; and it was to that extent properly set aside.

The fact that the regulations of the Secretary of the Interior provided that if the restrictions were removed from a part of the land included in an oil and gas lease, the entire lease should continue subject to the approval and supervision of the Secretary of the Interior and all royalties thereunder should be paid to the Indian agent until the lessor and lessee made adequate arrangements to account for the oil and gas upon the restricted land separately from that upon the unrestricted, obviously adds nothing to the force of the extension lease in so far as it includes the fifty acres of "surplus" lands, and can have no effect in relieving it as to such lands from the invalidity attaching by reason of the noncompliance with the laws of the State.

And the extension lease being entirely invalid as to the "surplus" fifty acres, the court is without authority to permit the lessees to continue to extract oil and gas therefrom although done in such manner as not to interfere with the plaintiff's use of the surface as a homestead.

The decree of the Circuit Court of Appeals is affirmed as to so much of the extension lease as covers the fifty acres of the "surplus" allotment, and reversed as to so much of said lease as covers the thirty acres of the "homestead" allotment.

Affirmed in part.
Reversed in part.